Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1996

BURLINGTON NORTHERN RAILROAD COMPANY, PETITIONER

v.

ESTATES OF RED WOLF AND BULL TAIL, VALERIE RED WOLF, GLADYS RED WOLF, RANDY RED WOLF, DORRIE BULL TAIL, DEWEY BULL TAIL, AND RON ARNESON, CROW TRIBAL COURT SPECIAL JUDGE, RESPONDENTS

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred, in light of this Court's recent decision in *Strate v. A-1 Contractors*, 65 U.S.L.W. 4298 (April 28, 1997), in concluding that exhaustion of tribal court remedies is mandatory and that the district court therefore had no discretion to issue a preliminary injunction to protect Burlington Northern's interstate rail assets from being seized by the Crow Tribal Court to satisfy a $250 million personal injury award entered by that court?

PARTIES TO THE PROCEEDING BELOW

All of the parties to the proceeding below are listed in the caption.

PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

On December 31, 1996, Burlington Northern Railroad Company changed its name to The Burlington Northern and Santa Fe Railway Company. The Burlington Northern and Santa Fe Railway Company is a wholly-owned subsidiary of Santa Fe Pacific Corporation which, in turn, is a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation, which is a publicly-held corporation.

The Burlington Northern Santa Fe Railway Company owns more than 10%, but less than 100%, of the stock of the following companies:

Alameda Belt Line
The Belt Railway Company of Chicago
Camas Prairie Railroad Company
Central California Traction Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Longview Switching Company
Metrovias S.A.
M T Properties, Inc.
The Oakland Terminal Railway
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
St. Joseph Terminal Railroad Company
Sunset Railway Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
Trenes de Buenos Aires S.A.
TTX Company
The Wichita Union Terminal Railway Company

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PETITION FOR A WRIT OF CERTIORARI

The Burlington Northern Railroad Company ("BN") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-15a) is reported at 106 F.3d 868. The district court's order granting BN's motion for a preliminary injunction (Pet. App. 16a-23a) is unreported. Also included in Petitioner's Appendix are the Crow Tribal Court's decision (Pet. App. 24a-28a) and the decision of the Crow Court of Appeals (Pet. App. 29a-42a) on BN's motion for a stay pending appeal.

JURISDICTION

The court of appeals issued its opinion on January 29, 1997. BN filed a timely petition for rehearing and suggestion for rehearing en banc, which were denied on April 9, 1997. Accordingly, the petition for certiorari is due no later than July 8, 1997. On April 17, 1997, the court of appeals stayed the issuance of its mandate for thirty days pending the filing of this petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The text of the Act of February 12, 1889, 25 Stat. 660, which granted a right-of-way to BN's predecessor to build and operate a railroad across the Crow reservation, is set forth at Pet. App. 43a.

STATEMENT OF THE CASE

This Court's recent decision in *Strate v. A-1 Contractors*, 65 U.S.L.W. 4298 (April 28, 1997), brings much-needed clarification to the issues of subject matter jurisdiction and comity raised by the assertion of tribal court jurisdiction over

non-Indians. Before *A-1 Contractors*, the federal courts were split on the question of whether a tribal court's civil jurisdiction over non-Indians was territorially based or depended on other factors, such as the ownership of the land where the accident occurred. *Compare Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir.), *cert. denied*, 115 S.Ct. 485 (1994), with *A-1 Contractors v. Strate*, 76 F.3d 930 (8th Cir. 1996). But see *Yellowstone County v. Pease*, 96 F.3d 1169 (9th Cir. 1996), *cert. denied*, ____U.S.____ (May 12, 1997) (limiting *Hinshaw* to its facts and following the Eighth Circuit's decision in *A-1 Contractors*).

There has also been confusion in the lower courts about the proper scope of the tribal court exhaustion doctrine. The Eighth, Ninth and Tenth Circuits have all broadly interpreted this Court's decisions in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), as requiring exhaustion of tribal court remedies whenever a claim arose out of events occurring on the reservation. Indeed, these courts have gone so far as to require exhaustion of tribal court remedies even in cases where there was no prior proceeding pending in the tribal court.[1] The Seventh Circuit, on the other hand, has

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[1] *See, e.g., United States v. Tsosie*, 92 F.3d 1037 (10th Cir. 1996) (upholding district court's sua sponte dismissal of suit brought by the United States, on the ground that the Government was required to bring its suit in tribal court); *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 779 (1995) (holding that non-Indian challenging imposition of tax by the Tribe was required to file suit first in tribal court); *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1408 (9th Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992) (dismissing case at the Indian plaintiff's behest, after five years of litigation in state and federal courts, to allow plaintiff to bring suit in tribal court).

construed the tribal court exhaustion doctrine more narrowly, *see Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814-15 (7th Cir.), *cert. denied*, 510 U.S. 1019 (1993).

This case provides a good example of the Ninth Circuit's inflexible and mechanical approach to the tribal court exhaustion doctrine. After the Crow Tribal Court entered a $250 million judgment against BN in a wrongful death action arising out of a crossing accident, the federal district court in Montana issued an injunction to prevent the tribal court plaintiffs from interfering with interstate commerce by attempting to seize the only assets BN has on the Crow Reservation—its tracks and its trains. The district court abstained from deciding the merits of BN's challenge to the tribal court's subject matter jurisdiction, but concluded that it had the discretion to issue an injunction to protect its own eventual jurisdiction over the dispute and to preserve the status quo while the judgment was being reviewed.

On appeal, the Ninth Circuit reversed in a 2-1 decision. Describing the exhaustion doctrine as "mandatory," the majority concluded that exhaustion of tribal court remedies could be excused only if one of the three narrow exceptions set forth in footnote 21 of this Court's decision in *National Farmers Union*, 471 U.S. at 856 n.21, were met; because BN could not bring itself within the literal language of those exceptions, the court concluded that the district court had no discretion to grant even the limited relief of a preliminary injunction against enforcement of the tribal court judgment.

The Ninth Circuit's decision is plainly wrong in light of this Court's subsequent decision in *A-1 Contractors*. In that case, the Court unanimously rejected the territorial theory of tribal court jurisdiction, reiterating the presumption against tribal court jurisdiction over non-Indians recognized in *Montana v. United States*, 450 U.S. 544 (1981). More importantly for purposes of this Petition, the Court made

clear that exhaustion of tribal court remedies is "not an unyielding requirement," 65 U.S.L.W. at 4301 n.7, and should not be required at all in cases where the lack of tribal court jurisdiction is plain and exhaustion would therefore "serve no purpose other than delay." 65 U.S.L.W. at 4304 n.14.

Because the Crow tribal court's lack of jurisdiction over BN is clear under the test set forth in *A-1 Contractors,* the district court should not be required to abstain at all in this case, but rather should be free to decide the issue of subject matter jurisdiction immediately, without waiting for the outcome of BN's appeal to the Crow Court of Appeals. If the district court can properly declare the judgment void without any further delay, it necessarily follows that it also had the power to take the more limited step of granting a preliminary injunction against enforcement of the judgment. And even if abstention were still required on the merits of the jurisdictional issue, at the very least, *A-1 Contractors* demonstrates that the exhaustion doctrine is flexible enough to allow the district court to issue a preliminary injunction to preserve the status quo and to protect interstate commerce while a clearly questionable tribal court judgment is being reviewed.

Because the Ninth Circuit did not have the benefit of this Court's decision in *A-1 Contractors* when it issued its opinion or when it ruled on BN's petition for rehearing, BN urges the Court to grant its petition for certiorari, to vacate the decision below, and to remand this case for further proceedings in light of *A-1 Contractors.* Alternatively, the Court should grant the petition to resolve the confusion in the lowe courts concerning the proper application of the tribal court exhaustion doctrine.

A. Tribal Court Proceedings.

On November 22, 1993, three members of the Crow tribe were killed when their car was hit by a train at a BN railroad crossing. The crossing was located on the Crow reservation in Montana, where BN operates 20-25 trains each day over a right-of-way granted to its predecessor in 1889 by an Act of Congress. *See* Act of February 12, 1889, 25 Stat. 660, Pet. App. 43a.

In early 1994, the heirs of the driver and her mother filed a wrongful death action against BN in the Crow Tribal Court, seeking both compensatory and punitive damages (the "*Red Wolf*"case). From the outset, BN challenged the subject matter jurisdiction of the tribal court, filing a motion to dismiss for lack of jurisdiction. The Crow Tribal Court denied that motion, on the ground that the Crow Tribal Code provides for jurisdiction over all claims arising out of accidents occurring on the reservation. BN attempted to appeal this decision on an interlocutory basis, but the Crow Court of Appeals concluded that it had no jurisdiction to hear interlocutory appeals. ER 106.[2]

In November 1994, BN filed a declaratory judgment action in federal district court in Montana, seeking (among other things) a determination that the Crow tribal court lacked subject matter jurisdiction over the *Red Wolf* case. The district court refused to entertain the lawsuit, on the ground that this Court's decisions in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), required it to abstain from considering the federal question of tribal

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[2] Citations to "ER____" are to the Excerpts of Record filed by appellants in the court of appeals; citations to "SE___" are to BN's Supplemental Excerpts; citations to "CR____" are to the clerk's record on appeal.

court jurisdiction until BN secured a final decision on that issue from the Crow Court of Appeals. After the district court declined to rule, BN had no choice but to return to the Crow tribal court to complete discovery and try the *Red Wolf* case.

After two failed efforts to impanel a jury, the trial of the *Red Wolf* case finally began in the Crow tribal court in January 1996, under conditions that BN believes violated its rights to due process and equal protection. Over BN's objection, the venire panel was made up entirely of enrolled members of the tribe. Nonmember residents of the reservation— approximately 25 percent of the population—were excluded from the jury pool. SE 41, 59. Furthermore, the jury that heard the case included three relatives of the tribal court plaintiffs, as well as two others who had expressed significant bias against the Railroad during voir dire. SE 49-52, 66, 77-80. Rather than attempting to minimize the obvious risk of bias inherent in the jury pool, the tribal trial court itself appeared to endorse it. Before the jury was selected, a Crow tribal court judge (who was not presiding over the trial) gave a speech to the venire that Judge Kleinfeld, who dissented in the Ninth Circuit, characterized as being of the "'wave the bloody shirt' genre," Pet. App. 11a. Speaking in the Crow language, Judge Donald Stewart appeared to exhort the jurors to take action against BN:

> Now Crows, you in this room all of you. This matter you know well; you are not young. This matter we respect. There is prayer involved in this matter. Our way of life, our good way of life. *A train runs through the middle of our land, Crows, you know, I don't have to tell you. Bodies, in the past, bodies are scattered along the railway. Now, this is the day.*

SE 46, 61-64 (emphasis added).

Although there was evidence that both the 17-year-old driver and her mother were intoxicated when the accident occurred, the jury returned a verdict finding BN 100% liable for their deaths and assessing "compensatory" damages in the unprecedented amount of $250,000,000 (awarding $50,000,000 to each heir). SE 34, 38-39. The tribal trial court entered judgment in that amount on February 7, 1996, with the trial judge observing that if he had been on the jury he would have awarded punitive damages in addition to the $250 million in compensatories. SE 55-56.

B. Post-Trial And Federal District Court Proceedings.

Following the entry of the $250 million judgment, the focus of the litigation shifted to the question of whether the judgment could be enforced while it was being appealed to the Crow Court of Appeals and, if necessary, reviewed in the federal court. The issue was an important one because BN has substantial operating assets on the Crow reservation, including approximately 50 miles of track and trains that carry 20-25 trainloads of freight per day. SE 96-97. It was undisputed that any attempt to seize these assets to satisfy the judgment would disrupt BN's interstate rail operations which include, among other things, the transportation of sixteen trainloads per day of coal to Midwestern utilities. *Id.*

Rule 18 of the Crow Rules of Civil Procedure provides an automatic ten-day stay of enforcement of a judgment, but then requires a defendant to post a bond for the full amount of the judgment as a condition to a full-fledged stay pending appeal. ER 39. Posting a bond in tribal court, however, was problematical: if the tribal court plaintiffs executed on the bond after a favorable ruling by the Crow Court of Appeals (as they would be entitled to do under the Crow Rules), BN might not be able to obtain any meaningful federal review of the judgment.

Furthermore, posting a bond in tribal court might well preclude BN from challenging the fairness of the tribal court judgment in any court other than the Crow Court of Appeals. Under the Indian Civil Rights Act (the "ICRA"), 25 U.S.C. § 1302, a tribal court is required to afford due process and equal protection to all litigants. But in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), this Court held that there is no private right of action to enforce the ICRA. In the previous federal court litigation, the tribal court plaintiffs took the position that *Santa Clara Pueblo* would preclude BN from seeking review of any judgment in federal court on the ground that it was secured in violation of BN's due process rights under the ICRA.[3]

If plaintiffs were right about the limited scope of federal review, BN would have to find another way to obtain due process review of the judgment.[4] The only other possibility

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[3] The tribal court plaintiffs explained their position to the federal court as follows:

> [T]here is no federal cause of action based on alleged due process violations. Simply stated, federal courts do not serve as courts of appeal for tribal courts. The most that [BN] can obtain is a review by this Court *after* all tribal court remedies have been exhausted. Even at that, the federal court 's review will be limited to whether the Tribal Court had jurisdiction over the action.

Defts' Mem. in Opp. to Preliminary Injunction in No. 94-156-BLG-JDS at 5, filed on Nov. 7, 1994 (emphasis in original).

[4] BN disagrees with the tribal court plaintiffs' broad interpretation of *Santa Clara Pueblo*, which involved a very different fact situation. However, the law on this point is unsettled. Given the size of the judgment, BN was unwilling to gamble that its interpretation of the ICRA and *Santa Clara Pueblo* would

would be to force the tribal court plaintiffs to file an action in state or federal court to enforce the judgment against BN's off-reservation assets. BN should be able to raise its claim that the judgment failed to comport with fundamental principles of due process as a defense to such an enforcement action.[5] To preserve that option, however, BN could not afford to post a bond in tribal court, since bonding the judgment would make it unnecessary for the tribal court plaintiffs to seek enforcement of the judgment outside the reservation.

Thus, BN faced an immediate dilemma. If it posted a bond in tribal court, it risked sacrificing its ability to challenge the fundamental fairness of the $250 million judgment outside the tribal court system. But if it refused to post a bond, BN risked the possible seizure of its operating assets on the reservation and the resulting disruption of vital services to its customers.

BN sought to resolve this dilemma first by asking the tribal trial court to stay enforcement of the judgment without requiring BN to post the supersedeas bond required by the Crow Rules of Civil Procedure. In an order issued on February 9, 1996, the tribal trial court denied that motion. Pet. App. 24a. The court acknowledged that "there is no question" "that defendant, Burlington Northern Railroad, is capable of satisfying the judgment order of this Court" in

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ultimately be accepted.

[5] Under *Hilton v. Guyot*, 159 U.S. 113, 205-06 (1895), and state law principles embodied in the Uniform Foreign Money Judgments Recognition Act, *see, e.g.*, Mont. Code Ann. § 25-9-601 *et seq.*, a defendant ought to be able to defend against enforcement of a foreign judgment, including a tribal court judgment, on the ground that the procedures employed by the court were incompatible with fundamental principles of due process.

light of its "enormous assets, both real and personal." Pet. App. 26a-27a. The tribal court nevertheless rejected BN's motion for a stay without a bond because "none of Defendant's assets are accessible to Plaintiffs in this case in 'Crow Country'. And . . . Defendant will not voluntarily make them accessible." *Id.* Pointing to BN's continuing objection to the tribal court's jurisdiction, the tribal court judge concluded that it was appropriate to require a bond as a condition to a stay of enforcement so the tribal court plaintiffs would not be forced to seek enforcement of the judgment in courts outside the reservation. Pet. App. 26a.

BN immediately sought review of this ruling in the Crow Court of Appeals. Because there was no assurance that the Crow Court of Appeals would rule on BN's motion before the ten-day automatic stay expired, BN also sought relief in federal court. On February 14, 1996, BN filed this action in federal district court in Montana against the tribal court plaintiffs and the tribal court trial judge. In its complaint, BN alleged that the tribal court judgment was void and unenforceable because the tribal court lacked subject matter jurisdiction over the case, because BN's federal preemption defenses had been improperly rejected, and because BN had been deprived of its rights to due process and equal protection. CR 3. BN sought injunctive relief to prevent any interference with its railroad operations on the Crow reservation or any attempts by the tribal court plaintiffs to enforce the judgment outside the reservation until all avenues of review had been exhausted. On February 15, 1996, following a brief hearing, the district court issued a temporary restraining order against enforcement of the judgment and scheduled a preliminary injunction hearing for February 26, 1996. CR 7.

Five days before the scheduled preliminary injunction hearing in federal court, the Crow Court of Appeals issued an opinion in which it denied BN's motion for a stay without

a bond. Pet. App. 29a. The court stated that tribal law "requires that at least a substantial portion of the judgment should be secured by a supersedeas bond, and the remainder of the judgment should be fully secured," Pet. App. 40a-41a, and directed the tribal trial court to hold further hearings to determine the nature and precise amount of the bond or security to be required.

On February 28, 1996, after receiving briefs and affidavits and holding a hearing, the federal district court granted BN's motion for a preliminary injunction against enforcement of the tribal court judgment. Pet. App. 16a. The district court concluded that BN had raised "serious legal questions" and that the "balance of hardships tips decidedly in BN's favor." Pet. App. 21a. The court agreed with BN that it should not be forced to post a bond or other security in tribal court because by doing so it would risk giving up the "opportunity to challenge alleged tribal court irregularities"outside the tribal court system. *Id.* The court also agreed that "interstate commerce and BN face irreparable harm if the Defendants are allowed to execute on the judgment." *Id.* The district court concluded that the tribal court plaintiffs would not be prejudiced by an order maintaining the status quo. *Id.* BN had submitted uncontradicted evidence showing that it had more than enough assets and earnings to pay the judgment. CR 3. In order to further protect the tribal court plaintiffs, the district court ordered BN to post a $5 million injunction bond. Pet. App. 22a.[6]

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[6] The amount of the bond was based on affidavit testimony submitted by BN showing that, even assuming clear liability, the expected maximum compensatory damages in a case such as this were approximately $500,000, making a $5 million bond more than sufficient to cover any possible recovery. SE 109, 115.

While issuing an injunction to preserve the status quo, the district court refrained from making any statements on the merits of BN's challenges to the tribal court judgment and stayed any further proceedings in federal court pending exhaustion of BN's remedies in the tribal court system. Pet. App. 19a.

C. The Ninth Circuit's Opinion.

The tribal court plaintiffs and the tribal court judge filed separate appeals, arguing that the district court had improperly interfered with the tribal court proceedings. A divided panel of the Ninth Circuit agreed and reversed the entry of the preliminary injunction. The majority applied a de novo standard of review to the district court's decision, holding that abstention was "mandatory" if tribal court remedies had not been fully exhausted. Pet. App. 6a. The majority concluded that BN had failed to exhaust its tribal court remedies because it had not secured a final ruling from the Crow Court of Appeals on the form of the security required to obtain a stay pending appeal from the tribal court. Pet. App. 7a.[7] The majority rejected BN's argument that further proceedings on the form of the security would have been futile, inasmuch as BN had decided, for the reasons outlined above, not to post a bond or other security in the tribal court. Although recognizing the validity of BN's fear that by posting a bond or other security it would give up the ability to obtain review of its due process objections to the judgment, the majority concluded that BN could not avoid the

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[7] After the Crow Court of Appeals ruled on BN's motion for a stay without a bond, the tribal trial court held a hearing at which BN stated that it was unwilling to post any security in the tribal court. The trial court entered an order requiring BN, as a condition to the entry of a stay, to post a supersedeas bond for the full amount of the judgment.

exhaustion requirement because it did not fall within the literal language of the exceptions to that requirement recognized in *National Farmers Union*. Pet. App. 8a.

Judge Kleinfeld dissented, on the grounds that an abuse of discretion standard should be applied, that BN had in fact exhausted its tribal court remedies on the question of whether it could obtain a stay in tribal court without posting a bond, and that the district court had made a "wise decision to preserve the status quo pending completion of the litigation, and to avoid the risk of destruction of property if the bond could not be posted." Pet. App. 10a-11a.

BN filed a timely petition for rehearing, with a suggestion for rehearing en banc. That petition was denied on April 9, 1997. On April 17, 1997, the court granted BN's motion for a stay of the mandate for thirty days pending the filing of this petition for certiorari.

D. BN's Efforts To Appeal Within The Tribal Court System.

On December 30, 1996, almost ten months after the judgment was entered, the tribal trial court finally issued an order "summarily" denying BN's post-trial motions, including its renewed motion to dismiss for lack of subject matter jurisdiction. BN immediately filed a notice of appeal to the Crow Court of Appeals. Shortly thereafter, the tribal court plaintiffs filed a statement with the Ninth Circuit representing that they had unilaterally reduced the amount of the judgment from $250 million to $25 million. Plaintiffs subsequently made the same representation to the Crow Court of Appeals. In an order issued on February 6, 1997, the Crow Court of Appeals stated its intention to remand the case to the tribal trial court for the limited purpose of

entering the reduced judgment.[8] No action has yet been taken, however, and no briefing schedule has been established for BN's appeal.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT'S DETERMINATION THAT THE TRIBAL COURT EXHAUSTION DOCTRINE PRECLUDED THE DISTRICT COURT FROM GRANTING A PRELIMINARY INJUNCTION CONFLICTS DIRECTLY WITH *A-1 CONTRACTORS*.

The courts below assumed, in light of this Court's decision in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), that the district court had to abstain from deciding the critical question of whether the tribal court had subject matter jurisdiction over the *Red Wolf* case until the Crow Court of Appeals ruled on that issue. Although BN argued that the exhaustion doctrine should not apply at all to its request for a preliminary injunction, the Ninth Circuit rejected that argument without comment, assuming that the exhaustion doctrine was "mandatory" and that it applied to any kind of interference with ongoing tribal court proceedings.

Footnote 14 of this Court's opinion in *A-1 Contractors*, however, demonstrates that the Ninth Circuit's analysis was wrong: the exhaustion requirement is not mandatory in all circumstances, but rather "must give way" where "it is plain

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[8] It should be emphasized that the plaintiffs' decision to reduce the judgment to the still exorbitant level of $25 million was not part of any settlement, nor was it conditioned on any concession by BN. Thus, although the amount of the damages has been reduced by a factor of ten, all of the issues in the case remain the same.

that no federal grant provides for tribal governance of nonmembers' conduct on land governed by *Montana's* main rule." 65 U.S.L.W. at 4304 n.14. Thus, in a case such as this, *A-1 Contractors* makes the abstention analysis dependent upon a preliminary examination of the tribal court's jurisdiction. If the *Red Wolf* case falls within the category of cases described in *A-1 Contractors,* where the lack of tribal court jurisdiction is "plain," the exhaustion doctrine should not preclude the district court from ruling on the question of tribal court jurisdiction.

If the district court need not wait for tribal remedies to be exhausted before ruling on the broad question of tribal court jurisdiction, it necessarily follows that the exhaustion doctrine does not preclude it from granting the much narrower relief of a preliminary injunction. The All Writs Act, 28 U.S.C. § 1651(a), gives a federal court the power to protect its own jurisdiction by granting an injunction to preserve the status quo.[9] If the district court could properly void the judgment without waiting for a tribal appellate court ruling, it surely can take the much less intrusive step of enjoining enforcement of the judgment pending a decision on its validity.

Furthermore, if the district court is not required by the exhaustion doctrine to avoid considering the merits of the jurisdictional issue, it also follows that the court's ability to grant preliminary injunctive relief is enhanced. For if the district court concludes that BN is likely to prevail on its

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[9] *See, e.g., FTC v. Dean Foods Co.*, 384 U.S. 597, 603-04 (1966) (court has power to preserve the status quo pending resolution of administrative proceedings in order to prevent the impairment of court's review function); *Virginia Dept. of Ed. v. Riley*, 23 F.3d 80, 83-84 (4th Cir. 1994) (granting interlocutory relief to party aggrieved by administrative action).

argument that the tribal court lacks subject matter jurisdiction and that the judgment is therefore likely to be declared void, that conclusion alone would provide a sufficient basis for enjoining any attempt to enforce the judgment either on or off the reservation.

It is the district court and the Ninth Circuit that should decide, in the first instance, whether this is the kind of case contemplated by footnote 14 of this Court's decision in *A-1 Contractors*, where abstention would serve no purpose other than to delay an already protracted proceeding. However, it is apparent that *A-1 Contractors* casts more than enough doubt on the ruling below to make this an appropriate case to grant, vacate and remand for further proceedings. *See Stutson v. United States*, 116 S.Ct. 600, 603 (1996) ("a GVR order both promotes fairness and respects the dignity of the Court of Appeals by enabling it to consider potentially relevant decisions and arguments that were not previously before it"); *id.*, 116 S.Ct. at 613 (listing cases in which a GVR was properly granted because "an intervening event (ordinarily a postjudgment decision of this Court) has cast doubt on the judgment rendered by a lower federal court or a state court concerning a federal question") (Scalia, J., dissenting) (emphasis deleted).

After the decision in *A-1 Contractors*, the lack of tribal court jurisdiction over the *Red Wolf* case could not be clearer. Like the defendant in *A-1 Contractors*, BN was operating on a federally granted right-of-way when the accident giving rise to the *Red Wolf* case occurred. The Act of February 12, 1889, 25 Stat. 660, gave BN's predecessor, the Big Horn Southern Railroad Company, a perpetual easement over an 80-mile strip of land running through the Crow Indian reservation to construct and operate a railroad. Section 3 of the Act specifically contemplated continuing federal regulation of the right-of-way, providing that the

> surveys, construction, and operation of such railroad shall be conducted with due regard for the rights of the Indians and in accordance with such rules and regulations as the Secretary of the Interior may make to carry out this provision.

Pet. App. 44a. Nothing in the 1889 Act purported to give the Crow Tribe any power to regulate the operation of the railroad or any right to adjudicate claims arising out of railroad accidents.

In *A-1 Contractors* this Court unanimously concluded that a state highway located on a federally-granted right-of-way was the equivalent of land alienated to non-Indians for purposes of the analysis required by *Montana v. United States*, 450 U.S. 544 (1981). 65 U.S.L.W. at 4303. The Court noted that the tribe had not reserved any "right to exercise dominion or control over the right of way," and held that by giving up the power to exclude non-Indians from the right-of-way, the tribe had also given up both regulatory and adjudicatory power over the land. *Id.*[10] The same analysis necessarily applies here: the 1889 Act gave the railroad the exclusive authority, under rules and regulations prescribed by the Secretary of the Interior, to use the right-of-way to construct and operate a railroad. Since the tribe gave up the right to exclusive use and occupancy of the land and did not retain the power to regulate the railroad, it necessarily follows that it also did not retain the power to adjudicate claims against the railroad. See 65 U.S.L.W. at 4302 ("As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction").

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[10] In *A-1 Contractors*, the evidence showed that the tribe had been paid for its consent to the right-of-way. 65 U.S.L.W. at 4303. The 1889 Act also provides that the Crow tribe was to be compensated for the right-of-way granted to BN's predecessor.

There is no statute or treaty that gives the Crow tribe the power to adjudicate claims against the railroad.[11] Thus, under the analysis in *A-1 Contractors*, there is no tribal court jurisdiction over such claims unless one of the two *Montana* exceptions applies. As construed by the Court in *A-1 Contractors*, the exceptions are quite narrow. Tribal court jurisdiction can arise out of a consensual relationship, but only if the claims themselves arise out of a consensual relationship between the plaintiff and the defendant. 65 U.S.L.W. at 4303. In this case, there was no consensual relationship or indeed, any relationship at all, between the Railroad and the plaintiffs' decedents, who were attempting to cross the railroad right-of-way when they were killed.

The second exception also does not apply. Regulatory or adjudicatory authority over railroad crossing accidents is not necessary to "protect tribal self-government or to control internal relations" or to "preserve 'the right of reservation

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[11] There are three treaties between the Crow Tribe and the United States, the 1825 Treaty (7 Stat. 266), the 1851 Treaty of Fort Laramie (11 Stat. 749) and the 1868 Treaty (15 Stat. 649). The 1868 Treaty specifically addresses the issue of claims by Indians against non-Indians, providing not for adjudication by the Crow tribe, but rather for reimbursement by the United States of any losses suffered by members of the Tribe:

> if bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained.

Indians to make their own laws and be ruled by them.'" 65 U.S.L.W. at 4303. As the Court observed in *A-1 Contractors*, the tribal court plaintiffs can bring their wrongful death claims in state court, *see Lambert v. Ryozik*, 268 Mont. 219, 886 P.2d 378, 380 (1994); giving the tribal court plaintiffs the option of suing in tribal court and thereby requiring BN to defend itself "in an unfamiliar court is not crucial to 'the political integrity, the economic security, or the health or welfare of the" Crow tribe. *Id.* (footnote omitted).

In light of the clear lack of tribal court jurisdiction, requiring BN to further exhaust its tribal court remedies on the issue of subject matter jurisdiction would serve no purpose other than delay. Despite BN's persistent efforts to obtain a ruling from the Crow Court of Appeals on the issue of subject matter jurisdiction, it has been unable to do so in the three years the *Red Wolf* case has been pending in the tribal court. There is no guarantee that BN will be able to obtain a ruling from the Crow Court of Appeals in the near future: more than fifteen months after the verdict was entered, BN's appeal remains in a state of suspense.

This is the kind of analysis the court of appeals should have employed in deciding whether the district court abused its discretion in issuing a preliminary injunction. Because the court of appeals did not have the benefit of this Court's reasoning in *A-1 Contractors*, BN urges the Court to grant, vacate and remand this case for further proceedings in light of that decision.

II. THE NINTH CIRCUIT'S DECISION THAT EXHAUSTION OF TRIBAL REMEDIES IS "MANDATORY" AND THAT NO FUTILITY EXCEPTION APPLIES CONFLICTS WITH THIS COURT'S FLEXIBLE ANALYSIS IN *A-1 CONTRACTORS*.

Wholly apart from the question of subject matter jurisdiction, the Ninth Circuit's determination that the tribal court

exhaustion doctrine is mandatory, leaving no room for the exercise of any discretion by the district court, is fundamentally at odds with this Court's explanation of the doctrine in *A-1 Contractors*. As a result, whether or not this is a case where the lack of tribal court jurisdiction is so plain that exhaustion of tribal court remedies is not required on the merits of BN's federal complaint, the Court should grant, vacate and remand for further proceedings in light of *A-1 Contractors*.

The court of appeals applied the tribal court exhaustion doctrine in an utterly mechanical and inflexible fashion. The court concluded that the district court had no discretion to act to protect interstate commerce because the tribal court exhaustion doctrine is "mandatory." Pet. App. 7a. It then concluded that BN had failed to exhaust its tribal court remedies because it had not obtained a final ruling from the Crow Court of Appeals on a completely irrelevant point—what form of security was necessary to satisfy that court's requirement that any portion of the judgment that was not bonded be "fully secured." Pet. App. 7a.

The court of appeals rejected BN's argument that any further tribal court proceedings on the form of the security would have been futile because BN had decided, for the reasons outlined above, that it could not risk posting a bond or other security in the tribal court. The court did not disagree with BN's analysis of the risks inherent in posting security in tribal court; on the contrary, the court recognized that by posting a bond or other security in tribal court BN might well be giving up the ability to obtain review of the fairness of the judgment outside the tribal court system. Pet. App. 8a. Nevertheless, the court concluded that BN was not excused from exhausting its tribal court remedies on the form of the security because its futility argument did not fall within the literal terms of the futility exception specifically described in footnote 21 of *National Farmers Union*, 471

U.S. at 856 n.21. That footnote recognizes that exhaustion is not required where further proceedings would be futile "because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Id.* Because it concluded that BN would have an adequate opportunity to challenge the tribal court's jurisdiction, the court held that the futility exception did not apply.

The court of appeals' decision cannot be squared with this Court's description of the exhaustion doctrine in *A-1 Contractors*. Far from treating the exhaustion doctrine as "mandatory," as the court of appeals did, this Court emphasized in *A-1 Contractors* that exhaustion of tribal court remedies is "not an unyielding requirement." 65 U.S.L.W. at 4301 n.7. Moreover, the Court made clear that footnote 21 of *National Farmers Union* does not, as the court of appeals erroneously believed, define the entire universe of permissible exceptions to the exhaustion requirement. Instead, the Court recognized that principles of comity must be applied to tribal court proceedings in a practical, flexible way to ensure fairness and avoid undue delay. 65 U.S.L.W. at 4304 n.14.

In *Iowa Mutual*, 480 U.S. at 16, n.18, this Court invoked the "prudential" abstention principles that have been developed in the federal-state context as a model for the tribal court exhaustion doctrine. In subsequent decisions, the Ninth Circuit and other courts have lost sight of that connection, adopting instead an inflexible rule of exhaustion that effectively forced all disputes connected to an Indian reservation to be litigated, in the first instance, in tribal court. See note 1, *supra*. The decision in *A-1 Contractors* mandates a return to a more practical evaluation of the consequences of abstention, under the same kinds of "prudential" principles applied in deciding whether a federal court should abstain in deference to state court proceedings. 65 U.S.L.W. at 4302.

Thus, rather than looking solely to the question of whether tribal court remedies had been exhausted, the court of appeals in this case should have weighed a variety of factors in order to determine whether the district court had abused its discretion in issuing the preliminary injunction. It should have considered the impact of denying injunctive relief on BN's federal rights and the important federal interest in protecting interstate commerce. In *Harrison v. NAACP*, 360 U.S. 167, 178-79 (1959), this Court recognized that a federal court has the power to issue an injunction to protect a plaintiff's federal rights even if it is required to abstain pending the outcome of state court proceedings. So too in this case, even if the district court were required to abstain from deciding the question of tribal court subject matter jurisdiction until the Crow Court of Appeals ruled on that issue, the district court still had the power to protect BN's interstate rail assets from being seized in the interim.[12]

Other factors the court of appeals should have taken into account include (1) the likelihood that BN would eventually

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[12] Federal statutes prohibit an interstate rail carrier from "abandon[ing] any part" of a railroad line or "discontinu[ing] the operation" on a line unless the Board first issues a certificate finding "that the present or future public convenience and necessity require or permit the abandonment or discontinuance." See 49 U.S.C. §10903; *Hayfield N. R. Co. v. Chicago & N.W. Transp. Co.*, 467 U.S. 622, 628 (1984). In light of this statutory prohibition, any attempt to interfere with interstate railroad operations in order to enforce rights conferred by state or tribal law should be preempted by federal law. *See, e.g., Louisiana & Arkansas Ry. Co. v. Bickham*, 602 F.Supp. 383, 385 (M.D. La.), *aff'd without op.*, 775 F.2d 300 (5th Cir. 1985) (upholding injunction prohibiting a landowner "from interfering, diminishing, or making more inconvenient [the rail carrier's] use or operation and maintenance of its railroad servitude" pursuant to his claimed right to do so under state law).

be able to void the judgment on appeal or through subsequent review and (2) the adequacy of the alternative remedy provided by the tribal courts—a stay conditioned on the filing of a supersedeas bond or other security in tribal court—to protect BN's ability to secure full and fair review of the judgment.

If the majority of the court below had conducted the analysis required by *A-1 Contractors*, rather than looking solely at the question of whether BN had technically exhausted its tribal court remedies, we are confident that it would have agreed with the dissenting judge that the district court's decision was a "wise decision to preserve the status quo pending completion of the litigation, and to avoid the risk of destruction of property if the bond could not be posted." Pet. App. 10a-11a.

CONCLUSION

For all of the reasons outlined above, the petition should be granted, the decision below vacated, and the case remanded for further proceedings in light of this Court's decision in *Strate v. A-1 Contractors*. Alternatively, BN urges the Court to grant its petition in order to eliminate the confusion in the lower courts about the proper standard to be

applied in deciding whether exhaustion of tribal court remedies should be required.

Respectfully submitted.

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Dated: May 16, 1997

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 96-35254 and 96-35265

Burlington Northern Railroad Company,

Plaintiff-Appellee,

v.

Gladys Red Wolf; Randy Red Wolf; Dorrie Bull Tail; Dewey Bull Tail; Valarie Red Wolf; and Ron Arneson, Honorable Crow Tribal Court Special Judge,

Defendants-Appellants

Order Amending Opinion and Denying Petition for Rehearing En Banc and Amended Opinion

Appeals from the United States District Court for the District of Montana
Jack D. Shanstrom, District Judge, Presiding

Argued and Submitted
September 16, 1996 -- Seattle, Washington

Filed January 29, 1997
Amended April 9, 1997

Before: Eugene A. Wright, Mary M. Schroeder and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Wright;
Dissent by Judge Kleinfeld

SUMMARY

Government Law/Native Americans

The court of appeals reversed an order of the district court. The court held that a federal district court cannot enjoin the enforcement of an Indian tribal court's judgment before the judgment debtor exhausts tribal remedies.

A jury in Crow Tribal Court awarded $250 million to the heirs of two tribal members who were killed when a train operated by appellee Burlington Northern Railroad Company hit their car at a crossing on the reservation. The trial court denied Burlington's motion to stay the judgment and for a waiver of a bond pending its appeal to the Tribal Court of Appeals (TCA).

Burlington appealed and obtained a temporary restraining order in federal court enjoining enforcement of the judgment. Although the tribal court conducted a hearing on the posting of a supersedeas bond, Burlington refused to post one and suggested no alternative means of securing the judgment. The tribal court ruled that without Burlington's participation, it could not modify its previous order.

The TCA declined to review the bond order until the trial court entered final orders on the security required as a condition of staying the judgment. The TCA provided guidelines for determining the appropriate bond or other security and directed the trial court to stay further proceedings during the pendency of any restraining orders by the district court.

The district court acknowledged that tribal remedies had not been exhausted, but granted Burlington's motion for a preliminary injunction against execution or enforcement of the judgment, and ordered it to post a $5 million injunction bond. The court stated that the injunction was to maintain the status quo and preserve its jurisdiction.

On the judgment creditors' appeal, Burlington contended that further tribal proceedings to determine the amount of a bond or the nature of other security would be futile, because it could not risk posting a bond in tribal court due to the possibility that federal review might be unavailable if the judgment were enforceable on the reservation. Burlington asserted that by refusing to post a bond, it could obtain review of the judgment in federal court by forcing the judgment creditors to seek enforcement against off-reservation assets.

[1] In matters over which tribal courts assert concurrent jurisdiction, exhaustion of tribal court remedies is required as a matter of comity. At a minimum, tribal appellate courts must have the opportunity to review the determinations of the lower courts.

[2] As with any other exercise of federal jurisdiction, injunctive relief requires exhaustion of tribal court remedies unless there is an applicable exception to the exhaustion rule.

[3] The railroad's "futility" argument could not be construed as an exception to the exhaustion requirement. The judgment creditors agreed to condition the bond on completion of federal review. Regardless of the extent of review available, it could not be said that there was an inadequate opportunity to challenge the tribal court's jurisdiction, when federal review was assured.

[4] The district court's conclusion, that retention of jurisdiction was consistent with the exhaustion doctrine, confused the court's discretion to retain jurisdiction pending exhaustion of tribal court remedies with the exercise of jurisdiction before exhaustion. The court lacked discretion to exercise its jurisdiction until tribal remedies were exhausted, or an exception to the exhaustion requirement made it unnecessary.

[5] The district court was to dissolve the preliminary injunction and either dismiss the action without prejudice, or stay it until all tribal court remedies were exhausted.

Judge Kleinfeld dissented, writing that under the circumstances, Burlington's actions in the tribal courts constituted exhaustion of all available tribal remedies.

COUNSEL

Alexander Blewett, III, Boyt & Blewett, Great Falls, Montana; Joel E. Guthals, Wright, Tolliver & Guthals, Billings, Montana, for the defendants-appellants.

Michele Odorizzi, Mayer, Brown & Platt, Chicago, Illinois, for the plaintiff-appellee.

ORDER

The opinion filed on January 29, 1997, is amended as follows: on slip Opinion pages 951-52, footnote 2, add ", in federal court" at the end of the last sentence of footnote 2.

The amended footnote will read:

> This due process review would be unavailable if appellants later prevail on their argument that *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), precludes private enforcement of the Indian Civil Rights Act, 25 U.S.C. § 1302(8), in federal court.

A majority of the panel has voted to deny the petition for rehearing, and Judge Schroeder has voted to reject the suggestion for a rehearing en banc. Judge Kleinfeld has voted to grant the petition for rehearing and accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED** and the suggestion for a rehearing en banc is **REJECTED.**

OPINION

WRIGHT, Circuit Judge.

We must decide whether a district court may enjoin Indian tribal court proceedings before tribal remedies have been exhausted. We conclude that it may not because no exception to the exhaustion rule applies.

BACKGROUND:

A jury in Crow Tribal Court awarded $250 million to the heirs of two tribal members killed when a Burlington Northern Railroad train hit their car at a railroad crossing on the reservation. Under the Crow Tribal Code, execution on the judgment was automatically stayed for ten business days. The Railroad moved to stay the judgment and to waive the Code's supersedeas bond requirement pending its appeal to the Crow Court of Appeals. The trial court denied the motion and ordered the Railroad to post bond in the amount of the judgment plus interest as required by Rule 18 of the Crow Tribal Court.[1/] The Railroad appealed that bond ruling. Before the tribal appellate court ruled on that question, the Railroad

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[1/] Rule 18(b) provides that when a final order or judgment is appealed, the tribal court may grant a stay of execution or judgment upon appellant's motion, provided that appellant, on or before the date of filing the appeal, posts a surety bond sufficient to guarantee performance of the judgment and payment of the costs of appeal.

sought and received a temporary restraining order in federal court enjoining enforcement of the tribal court judgment.

The tribal trial court held a previously scheduled hearing regarding posting of a supersedeas bond, but the Railroad refused to post such a bond and presented no alternatives to secure the judgment. The trial court held that without the Railroad's participation it could not modify its previous order. The Tribal Court of Appeals declined to review the trial court's bond order until after that court entered final orders concerning the specific security required as a condition of staying the judgment. It provided guidelines for the trial court's determination of the appropriate bond or other security required and directed that court to stay all proceedings to execute on the judgment and any requirement for security during the pendency of any restraining orders issued by the district court. It further instructed the trial court to proceed to determine the appropriate form of security to be implemented when all federal restraining orders were lifted.

Meanwhile, the district court granted the Railroad's motion for a preliminary injunction against execution or enforcement of the tribal court judgment. The injunction was intended to "maintain [ ] the status quo and preserv[e] the court's jurisdiction should future federal litigation occur in this matter." The district court ordered the Railroad to post with the federal court a $5 million bond as security for the injunction, retained jurisdiction and stayed all further proceedings pending exhaustion of tribal remedies. The judgment creditors appeal the preliminary injunction.

ANALYSIS:

1. *Standard of Review*

We review de novo whether the court was required to abstain from granting the injunction because Indian tribal court remedies had not been exhausted. *Burlington Northern RR. v. Crow Tribal Council*, 940 F.2d 1239, 1244-45 (9th Cir. 1991)

("[T]he requirement of exhaustion of tribal remedies is not discretionary; it is mandatory."); *Stock West Corp. v. Taylor*, 964 F.2d 912, 920 (9th Cir. 1992) (en banc) (conducting independent review of the applicable law and affirming abstention pending exhaustion of tribal court remedies).

2. *Exhaustion of Tribal Court Remedies*

[1] In matters over which tribal courts assert concurrent jurisdiction, exhaustion of tribal court remedies is required as a matter of comity. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985). "At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987).

The Railroad argues that the tribal courts had an adequate opportunity to decide whether or not it must post a supersedeas bond. Its motion for a stay from posting a bond in tribal court was considered by both the tribal court and the tribal appellate court. It concedes, however, that there was no final ruling on the form and amount of security that would suffice to stay the judgment.

[2] The district court acknowledged that tribal remedies had not been exhausted, but nevertheless exercised its injunctive power to maintain the status quo and to preserve its jurisdiction. As with any other exercise of federal jurisdiction, injunctive relief requires exhaustion of tribal court remedies unless there is an applicable exception to the exhaustion rule. *National Farmers* recognized certain exceptions to the exhaustion requirement:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," *cf. Juidice v. Vail*, 430 U.S. 327, 338 (1977) or where the action is

> patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

National Farmers, 471 U.S. at 856 n.21; *see also, Crawford v. Genuine Parts Co., Inc.*, 947 F.2d 1405, 1408 (9th Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992).

The Railroad does not argue that a *National Farmers* exception applies. But it does argue that further tribal court proceedings to determine the amount of a bond or the nature of other security would be futile because it could not risk posting a bond or other security in tribal court. It asserts as a reason for refusing to post bond in tribal court that alleged due process violations at trial might not be eligible for federal review if the judgment can be enforced on the reservation.[2/] The Railroad argues that a federal court proceeding to enforce the judgment could provide its only opportunity to challenge the $250 million judgment. *See Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410 (9th Cir.) (holding that a foreign judgment cannot be enforced if it was obtained in a manner not in accord with due process), *cert. denied*, 116 S.Ct. 519 (1995). By refusing to post a bond in tribal court, the Railroad hopes to force the judgment creditors to enforce the judgment in federal court against off-reservation assets.

[3] The Railroad's "futility" argument cannot be construed as an exception to the exhaustion requirement. The *National Farmers* futility exception applies where exhaustion would be futile because of lack of adequate opportunity to challenge the court's jurisdiction. *National Farmers*, 471 U.S. at 856 n.21. The judgment creditors here agreed to condition

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[2/] This due process review would be unavailable if appellants later prevail on their argument that *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), precludes private enforcement of the Indian Civil Rights Act, 25 U.S.C. § 1302(8), in federal court.

the supersedeas bond upon completion of all available federal review. Regardless of the extent of review available, it may not be said that there is inadequate opportunity to challenge the court's jurisdiction when, as here, federal review of tribal court jurisdiction is assured.

3. *Retention of Jurisdiction v. Exercise of Jurisdiction*

[4] In its order granting injunctive relief, the district court acknowledged that exhaustion is a matter of comity, not a jurisdictional prerequisite. It said, citing *National Farmers*, that retention of jurisdiction pending completion of tribal proceedings is consistent with the exhaustion doctrine. The court concluded it could exercise jurisdiction for the purpose of maintaining the status quo and preserving its jurisdiction even though the Railroad had not first exhausted its tribal court remedies. This conclusion confuses the court's discretion to retain jurisdiction pending exhaustion of tribal court remedies (an alternative to dismissal) with the exercise of jurisdiction prior to exhaustion. The court lacks discretion to exercise its jurisdiction until tribal remedies have been exhausted or an exception to the exhaustion requirement makes exhaustion unnecessary.

CONCLUSION:

[5] We hold that under *National Farmers*, the court erred in exercising its jurisdiction because the Railroad had not exhausted its remedies in the tribal courts or established that any exception to the exhaustion requirement applied. The district court will dissolve the preliminary injunction and either dismiss this action without prejudice or stay it until all tribal court remedies have been exhausted.

REVERSED AND REMANDED.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

This case resembles *Pennzoil*, in that the defendant sought federal court protection against a huge defeat in a tribunal other than a federal district court. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1986). But there is one very big difference. The courts of Texas are bound by the Constitution of the United States. The courts of the Crow tribe are not. "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations of federal or state authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1977).

Had Burlington Northern lost its case in a court of a foreign country which did not accord due process, the judgment would not be enforceable in the United States. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410 (9th Cir. 1995); *Hilton v. Guyot*, 159 U.S. 113, 205-06 (1895). But Indian country is not foreign in this sense, so a judgment debtor in a tribal court cannot raise *Bank Melli Iran* as a bar to execution. It is hard to say what degree of comity or full faith and credit may be accorded to the tribal court decision, if the tribe seeks to execute on its judgment outside the reservation, *see* William C. Canby, *American Indian Law* 155-56 (1981); Felix S. Cohen, *Handbook of Federal Indian Law* 145 (1942), or what remedy, if any, Burlington Northern and others dependent on its trains may have if the tribe tears up its tracks and sells them for scrap, in the absence of a $250 million cash or equivalent supersedeas bond.[1/] The district court made a wise decision to preserve the

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[1/] The parties have recently filed a paper entitled "notice," advising us that the judgment "has been reduced by Appellants" to $25 million, "that is, FIVE MILLION DOLLARS ($5,000,000.00) for

status quo pending completion of the litigation, and to avoid the risk of destruction of property if the bond could not be posted. We should leave the district court order intact. *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384 (9th Cir. 1988) (preservation of status quo appropriate, and no further exhaustion of remedies needed, though final judgment had not yet come down in tribal court).

Serious questions cast a shadow over the tribal court judgment. The two decedents were hit at a well marked crossing, where there had been no accident for fifty years. The train was going 41 miles per hour, well below the speed limit of 60. Both decedents were drunk -- the 17-year-old driver of the car had a blood alcohol level of 0.18 percent, her mother, the passenger, who had allowed her daughter to drive, 0.32 percent. The experienced personal injury lawyer who submitted an affidavit in connection with security for the judgment estimated the reasonable expectation for verdicts as $350,000 for the mother, $150,000 for the daughter. This $500,000 evaluation assumes that a reasonable jury could satisfy itself that the railroad did something negligent which caused the deaths, and that comparative negligence was less than 100%.

The trial appears to have been in the "wave the bloody shirt"[2/] genre. Before voir dire, a judge of the Crow appellate

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each claimant." The claimants say that they "agree and stipulate" that "any appeal bond . . . need only be in the amount of $25,000,000.00 plus interest," with payment to be conditioned on "whatever federal review is appropriate under the circumstances." It is hard to know what to make of this change, or how it affects this case if at all, because there is no court order, stipulation by Burlington Northern, or supplementation of the record regarding any subsequent course of proceedings.

[2/] A symbol used to inflame to anger or to retaliative action -- used specifically in the U.S. after the Civil War of any means employed to

court addressed the entire venire in the Crow language (Burlington Northern had not been given notice that the jurors would be so addressed in the Crow language), reminding them of "bodies scattered along the railway" in the past, and reminding them of their "genealogy":

> Now Crows, you in this room all of you. This matter you know well; you are not young. This matter we respect. There is prayer involved in this matter. Our way of life, our good way of life. A train runs through the middle of our land. Crows, you know, I don't have to tell you. Bodies, in the past, bodies are scattered along the railway. Now, this is the day. You use your better judgment. I am not telling you what to do. I am not telling you who to follow. I am not telling you who to believe. Use your better judgment. God gave you a mind. God gave you a heart. This day, even this day use it. How am able to help. You should consider if you are a Crow. I don't have to tell you, you must use your mind. Look for a good solution. If this proceeding is successful, you will not be blamed. You are right, you are correct, you are proper. In the past this bench we were ridiculed. The people who presided are called upon. The people who presided are ridiculed, mocked. That's the way you Crows are. Within our reservation there is not many. You Crows established it. Other tribes are under the government, CFR. We are lucky. We have our own court. Consider that, you men and women.

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stir up or revive party or sectional animosity, especially in the phrase 'wave the bloody shirt.'" *Webster's Third New International Dictionary* 238 (1981).

> If you are kind, if you love, we are interrelated. Use your better judgment. Consider your people. Consider these people, consider those people. Use your better judgment. I want the creator to guide you. We are not kidding. Remember, young men and women. You are selected today because you are honest, because of your genealogy.

The reference to "genealogy" was not a mere metaphor. All but one of the seven empaneled jurors were related to the decedents. Acknowledging the "bodies scattered along the railway" theme, the decedents' heirs stated in their opposition to judgment n.o.v. in tribal court that "what the trial was about" was that "there have, in fact, been many Crows killed by the BN and this is no secret." There may be a tribal court jurisdiction issue, regarding this tort case over a non-tribal member defendant operating on an easement to which tribal land is subject.

If Burlington Northern posts the $250 million, it subjects the money to the decisions of a tribunal not bound by the Constitution. If it does not, it risks having its tracks across the reservation torn up and sold for scrap to satisfy the judgment. If it posts the money, the tribal court distributes it to the claimants, and the district court subsequently orders return of the money, enforcement of the district court's order might be problematic.

A party must exhaust its tribal remedies before seeking relief in federal district court. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). Burlington Northern has done that. It applied to the tribal court for relief from the requirement that it post a $250 million supersedeas bond. The tribal court denied relief. Burlington Northern then appealed to the tribal court of appeals. That court had not ruled when the ten day automatic stay expired. At that time, there was nothing

Burlington Northern could do, no relief which could be sought, in tribal court prior to levy of execution. Exhaustion was therefore complete at that time.

In order to avoid levy of execution before the tribal court of Appeals ruled, Burlington Northern petitioned the district court for a temporary restraining order. After the ten day automatic stay had expired, the tribal court did rule, but that ruling also gave Burlington Northern no practical relief. The tribal court of appeals ruled that in order to obtain a stay of execution, Burlington Northern had to post an acceptable surety bond, cash, letter of credit, government securities, pledges of specific physical assets and guarantee of payment and protection against transfers of assets. There is no reason why Burlington Northern should be required to wait and see what the trial court does before exhaustion is treated as complete. The tribal appellate mandate bound the trial court. The time for avoiding execution automatically had expired, and the requirements for what would have to be posted were set. All that remained was for Burlington Northern to turn over $250 million in one form or another, and ask the trial court whether the form was adequate.

A party need not exhaust tribal court remedies if exhaustion would be futile. "We do not suggest that exhaustion would be required where . . . exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 856 n.21 (1985). If exhaustion in a technical sense would require a final order from the trial court subsequent to the appellate tribal court's mandate, then requirement of this order would be futile. As explained above, the trial court could not grant Burlington Northern relief, and as a practical matter, Burlington Northern might well be unable to challenge tribal court jurisdiction effectively if the tribal appellate court supersedeas decision could not immediately be challenged.

Our reversal fails to apply the deferential standard of review required for preliminary injunctions. The district court did not have to decide, and did not decide, whether Burlington Northern was right in its challenge to the tribal court decision, or that the tribal court lacked jurisdiction. It needed only to balance the probability of success on the merits against the other relevant considerations. *See American Motorcyclist Ass'n. v. Watt*, 714 F.2d 962, 965 (9th Cir. 1983). The district court recognized that exhaustion was required for a challenge in federal court to a tribal court decision, but concluded that as to supersedeas, it had been accomplished. Regardless of whether the district court was correct, a difference of opinion with respect to application of a correctly recognized legal principle can be reversed only for abuse of discretion, and is not subject to de novo review. *Gregorio T. v. Wilson*, 59 F.3d 1002, 1004 (9th Cir. 1995); *Sports Form, Inc. v. United Press Int'l*, 686 F.2d 750, 752 (9th Cir. 1982).

Because the majority erroneously reviews de novo rather than for abuse of discretion, its opinion does not speak to whether the district court abused its discretion. For the reasons stated above, the probability of success on the merits was adequate to enable the district court to weigh irreparable harm. *See Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

There is also a very great public interest, weighed by the district court, because tearing up Burlington Northern's tracks through the reservation would interfere with interstate commerce outside the reservation. Several affidavits were submitted by officers of electrical utilities in the Midwest, which depend on a reliable supply of coal carried by Burlington Northern trains. The railroad runs 20 to 25 trains per day across the Crow reservation, 16 of which are coal trains bound for utilities in Minnesota and Wisconsin.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Burlington Northern Railroad Company,

Plaintiff,

v.

Estates of Red Wolf and Bull Tail;
Valerie Red Wolf; Gladys Red Wolf;
Randy Red Wolf; Dorrie Bull Tail;
Dewey Bull Tail, and Ronald R. Arneson
Crow Tribal Court Special Judge,

Defendants.

Cause No. CV 96-17-BLG-JDS
February 28, 1996

Order

On February 15, 1996, this court issued a Temporary Restraining Order (TRO) enjoining Defendants from executing upon or attempting to enforce the judgment entered on February 6, 1996, by the Crow tribal court in the matter of *Estates of Red Wolf and Bull Tail v. Burlington Northern Railroad Company*, Civil Case No. 94-31. On February 26, 1996, the parties appeared and argued whether the TRO should be made permanent. Upon consideration of the briefs and oral argument, the court grants Plaintiff's motion for a preliminary injunction.

Background

On November 22, 1993, on the Crow Indian Reservation, three members of the Crow Tribe were killed in a

collision with a Burlington Northern (BN) train. In early 1994, the heirs of two of the victims filed an action in the Crow tribal court seeking compensatory and punitive damages.[1/] In November 1994, BN sought relief in this court. *Burlington Northern Railroad Company v. The Honorable Ronald Arneson, et al.*, No. CV 94-156-BLG-JDS. This court dismissed the case by stating the parties must first exhaust their remedies through the tribal court system before seeking relief in federal court.

Back in the Crow tribal court, the first two attempts at bringing the case to trial ended in a mistrial. The third trial ended with a jury verdict awarding the five heirs of the two victims $50 million dollars a piece, for a total of $250 million dollars. Apparently, the jury award was solely for compensatory damages with none of the award based on loss of potential earning capacity. The jury award was not based on punitive damages.

BN claims it was prejudiced by numerous irregularities at the trial. For example, BN claims a Crow Appellate Court Judge, speaking in the Crow language, gave a prejudicial speech to the venire. BN claims the voir dire and jury selection process was faulty and a relative of a plaintiff was a member of the jury. BN claims the jury award was grossly excessive according to comparative studies, which indicated that damages for like-situated victims in other courts were in the range of $150,000.

Under the Crow Tribal Code, execution on the judgment was automatically stayed for ten business days. Since the Crow Tribal Court entered judgment on February 6, 1996, the automatic stay was in effect until February 20, 1996.

[1/] By order of the tribal court, the heirs of the third victim were severed out of this case. The court anticipates there will be another trial in tribal court involving the heirs of the third victim and BN.

On February 7, 1996, BN moved the Crow tribal court to stay execution without the necessity of posting a bond. On February 9, 1996, the Crow tribal Court denied this motion. On February 12, 1996, BN appealed the denial to the Crow Court of Appeals. On February 21, 1996, the Crow Court of Appeals denied BN's appeal of the tribal court's decision.

On February 15, 1996, after a hearing with argument, this court granted BN's request for a TRO, thereby enjoining Defendants from executing upon or attempting to enforce the judgment entered on February 6, 1996. On February 26, 1996, this court held a hearing on the merits of a preliminary injunction.

Summary of this Order

This court has subject matter jurisdiction and authority to issue a preliminary injunction. The purpose of the preliminary injunction is *to preserve the status quo while BN exhausts its remedies* before the tribal courts.

Discussion

The first issue is whether this court has jurisdiction to proceed in this case. This court has jurisdiction under three authorities: *National Farmers Union v. Crow Tribe*, 471 U.S. 845 (1985) and its progeny, the All Writs Act, and the power to protect interstate commerce.

I. ***National Farmers Union***

A federal court has subject matter jurisdiction over issues that raise federal questions requiring answers by reference to federal law. *National Farmers Union*, 471 U.S. at 852-53. BN has raised the following federal questions: whether the tribal courts have jurisdiction over this type of case, whether the federal law concerning railroad crossings pre-empts tribal law, and whether BN's due process rights under the Indian Civil Rights Act of 1968 have been violated. Since these questions "must be answered by reference to federal law

and [are] 'federal question[s]' under [28 U.S.C.] § 1331," this federal court has subject matter jurisdiction. Id.

Defendants argue BN must first exhaust all its remedies in the tribal courts before this court can assume jurisdiction. The court disagrees. In *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), the United States Supreme Court held that exhaustion is required as a matter comity, not as a jurisdictional prerequisite. *Id.* at 16 n.8. Furthermore, retention of jurisdiction pending completion of tribal proceedings is consistent with the exhaustion doctrine. *See, National Farmers Union*, 471 U.S. at 857 (district court may hold the action in abeyance pending development of Tribal Court proceedings); *LaPlante*, 480 U.S. at 20 n.14 (federal action may be stayed pending Tribal Court proceedings); *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 517 (8th Cir. 1989) (court of appeals strongly urged district court to stay the action, with jurisdiction retained, pending tribal court proceedings).

This court asserts jurisdiction only for the purpose of maintaining the status quo and preserving the court's jurisdiction should future federal litigation occur in this matter. At this time, the court abstains from considering the merits of the tribal court judgment and BN must continue to exhaust all its remedies before the tribal courts.

II. All Writs Act, 28 U.S.C. § 1651

Federal courts are expressly authorized by statute to issue injunctions in aid of their jurisdiction:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. §1651 (All Writs Act). The parties have argued over jurisdiction and the appropriate level of federal review of tribal

court proceedings. The All Writs Act grants this court the power to issue a preliminary injunction in order to maintain the status quo and to preserve these issues for federal review.

III. Interstate Commerce

By Act of Congress, BN has a federal right-of-way across the Crow Indian Reservation. BN's assets on the reservation are 50.25 miles of track and the trains that carry 20 - 25 trainloads of freight per day, including 16 trainloads of coal destined for Midwest utilities. *See*, Affidavit of Loren Mueller page 2. Seizure of these assets would interfere with interstate commerce and the production of electricity. *See*, Affidavit of Kevin Robb.

The railroad industry is subject to a complex statutory scheme under the administration of the Surface Transportation Board. Federal law pre-empts state laws and private activities that interfere with the industry. *See e.g., Louisiana & Arkansas Ry. Co. v. Bickham*, 602 F.Supp. 383, 384-85 (M.D. La), *aff'd without op.*, 775 F.2d 300 (5th Cir.1985) (district court entered an injunction prohibiting interference with railroad). This court has authority to issue injunctions to prohibit interference with interstate commerce and railroad operations.

In sum, this court has subject matter jurisdiction and authority to issue a preliminary injunction.

Preliminary Injunction

A fundamental principle of temporary injunctive relief is to preserve the *status quo ante litem* pending a determination of the action on the merits. *Los Angeles Memorial Coliseum Com'n v. National Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980). One moving for a preliminary injunction in this circuit assumes the burden of demonstrating either a combination of probable success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in its favor.

Wm. Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc., 526 F.2d 86, 88 (9th Cir. 1975).

It is clear, however, that there are not really two entirely separate tests, but that they are merely extremes of a single continuum. The critical element is the relative hardship to the parties. If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust likelihood of success on the merits as when the balance tips less decidedly. *Benda v. Grand Lodge of Intern. Ass'n of Machinists, etc.*, 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979). Under the continuum or sliding scale articulated in *Benda*, a minimal showing on the merits is required even the balance of a harm tips decidedly toward the moving party. Conversely, at least a minimal tip in the balance of hardships must be found even when the strongest showing on the merits is made. *Los Angeles Memorial Coliseum Com'n*, 634 F.2d at 1203-04.

The court finds BN has met its burden for a preliminary injunction. The "merits," as framed by BN, concerns the ability and scope of federal court review of tribal court proceedings. The court does not comment on the "likelihood of success" on the merits, however, some federal review is provided by case law. *See, National Farmers Union*, 471 U.S. at 852-53 (federal questions grants jurisdiction to federal courts).

The balance of hardship tips decidedly in BN's favor. As to the "critical element" - "the relative hardship to the parties" - Defendants will not be prejudiced by a maintaining of the status quo. *Benda*, 584 F.2d at 315. On the other hand, interstate commerce and BN face irreparable harm if the Defendants are allowed to execute on the judgment. Furthermore, serious legal "questions are raised." *Inglis*, 526 F.2d at 88. BN has shown that the area of Indian law regarding federal review of tribal court proceedings is in controversy and perhaps if BN posted a bond, BN would not have the opportunity to challenge alleged tribal court irregularities.

Finally, the preliminary injunction is being used to preserve the status quo, which is the "fundamental principle" of injunctive relief. *Los Angeles Memorial Coliseum Com'n*, 634 F.2d at 1200.

In accord with foregoing, IT IS ORDERED,

1. Until further order of this court, Defendants are restrained from executing upon or attempting to enforce the judgment entered on February 6, 1996, by the Crow Tribal Court, in and for the Crow Indian reservation, in the matter of *Estates of Red Wolf and Bull Tail v. Burlington Northern Railroad Company*, Civil Case No. 94-31.

2. Defendant's motion to dissolve the TRO, motion to deny preliminary injunction and motion to dismiss the action is denied.

3. Until further order of this court, further proceedings in this Court are stayed, pending exhaustion of tribal judicial remedies.

4. Pursuant to Rule 65(d) FRCP, Plaintiff shall give as security for the issuance of the present injunction, a bond in the amount of $5 million in the form presented in Plaintiff's Memorandum Regarding the Posting of a Bond to Secure the Issuance of an Injunction.

5. As discussed at oral argument, it is intent of this court that this order may be immediately appealed to the Ninth Circuit Court of Appeals under 28 U.S.C. § 1292 (a)(1) and § 1292(b), in that there is "substantial ground for difference of opinion and that an immediate appeal from [this] order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

The Clerk of Court is directed to forthwith notify the parties of the making of this order.

DONE and DATED this 28 day of February, 1996.

/s/ Jack D. Shanstrom
United States District Judge

CROW TRIBAL COURT
IN AND FOR THE CROW RESERVATION
CROW AGENCY, MONTANA 59022

Estates of Red Wolf and Bull Tail,

Plaintiffs,

v.

Burlington Northern Railroad Company,

Defendant.

Civil Case No. 94-31

February 9, 1996

Tribal Court Order

OPINION

Defendant, Burlington Northern, filed a Motion For Stay on a Judgment Order issued by this Court on February 7, 1996, for compensatory damages totaling $250,000,000.00. Among other things Defendant, Burlington Northern, argues in their Motion to Stay that this case "involves *novel* issues of Crow Tribe tort law, such as the appropriate rule with respect to the relative fault of the parties, and other matters regarding required standards of conduct upon which fault determination can be based.", emphases added. The Motion to Stay further states "This litigation also involved questions under the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301 *et seq.* For example, Burlington Northern challenged the jury selection procedures on due process and equal protection grounds. In addition, this case raises questions of the scope of tribal

sovereignty over non-members of the tribe. Burlington Northern has also raised issues of federal preemption of tribal law."

Since this Court has heard this case from the beginning, this Court has personal knowledge of Defendant's, Burlington Northern Railroad's, challenge of this Court jurisdiction. The quotes contained in Defendant's Motion For Stay reflect this same continual challenge of this Court's jurisdiction in this case.

Rule 18(b) Rules of Civil Procedure, CTC, reads as follows:

> "(b) Stay Pending Appeal. When an appeal of a final judgment or order of the Crow Tribal Court is taken, the court, upon appellant's motion, may grant a stay of execution of judgment, provided that appellant post a surety bond sufficient to guarantee performance of the judgment, and payment of the costs of appeal, on or before the date of filing this appeal."

It is clear to this Court, Crow law requires the posting of a "surety bond sufficient to guarantee performance of the judgment, and payment of the costs of appeal, on or before the date of filing this appeal."

Though not mandatory applicable law in "Crow Country," Federal Rule 62(d), Fed.R. Civ.P., allows a Court to waive the bond requirement but only after considering the following factors:

> (1) The complexity of the collection process;
>
> (2) The amount of time required to obtain a judgment after it is affirmed on appeal;
>
> (3) The degree of confidence that the district court has in the availability of funds to pay the judgment;

(4) Whether defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and

(5) Whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position. *In re Oil Spill by the Amoco Cadiz*, 744 F. Supp. 848 (D.C.III. 1990).

This Court will consider the requirements under the applicable Federal Rule 62(d), Fed.R. Civ. P., on bond waiver issue. The Defendant, Burlington Northern Railroad, has not since the filing of this case recognized the Court's jurisdiction. The record is replete with motion after motion stating the same premise. The legal collection process in "Crow Country" as to the Defendant would be difficult considering that Defendant maintains very limited assets within the Crow Reservation.

As to items (1) and (2), the judgment is for a large sum of money. Collection of a judgment for a large sum of money is often very difficult. Considering Defendant, Burlington Northern Railroad's, enormous resources and this Court's judgment order, it does not seem unreasonable to predict several years of litigation will result in the appeals process. Defendant, Burlington Northern Railroad, states in their Motion For Stay "Moreover, permitting enforcement efforts during the pendency of the appeal is likely to implicate the state or federal courts in collection litigation." This Court considers this an admission by Defendant, Burlington Northern Railroad, that they will pursue the course they have set in this case of non-recognition of this Court's jurisdiction relative to the judgment order for the next several years.

As to items (3) and (4), there is no question in this Court's opinion that Defendant, Burlington Northern Railroad, is capable of satisfying the judgment order of this Court. However, it is likewise clear to this Court that none of Defendant's assets are accessible to Plaintiffs in this case in

"Crow Country". And that Defendant will not voluntarily make them accessible. As to item (4), it is clear to this Court, Defendant, Burlington Northern Railroad, has enormous assets, both real and personal. However, these assets are not within the boundaries of the Crow Reservation and thus are not in "Crow Country".

Item (5) as to other creditors does not need to be addressed again by this Court it having been addressed supra.

The *Cadiz* Court expressed this Court's opinion in very eloquent terms stating as follows:

> "If Astilleros' (Defendant, Burlington Northern Railroad in the instant case) briefs (BN's actions, motions, arguments, etc.) establish anything it is that Astilleros (BN) has no intention of recognizing this court's judgment against it. Far from assuring the court that it will pay the judgments, Astilleros (BN) has given this court the impression that it will not recognize this court's jurisdiction - even if it loses on appeal. Further by its own admission, Astilleros (BN) has no assets in this county ("Crow Country") or anywhere within reach of this court which could be used to satisfy the judgments against it, should those judgments be affirmed on appeal. For these reasons the court holds that Astilleros (BN) is denied a stay without bond.", Id. at 850-851.

ORDER

Defendant's, Burlington Northern Railroad's, Motion For Stay is hereby summarily denied. Defendant, Burlington Northern Railroad, shall post a surety bond as required by Rule 18(b), Rules of Civil Procedure, CTC. The supersedeas bond

shall be posted by Defendant, Burlington Northern, only after approval by this Court.

A hearing shall be held in this Court on the posting of the supersedeas bond wherein Defendant shall present the bond to the Court for approval. Defendant, Burlington Northern Railroad shall present a copy of the proposed bond to the Court and to Plaintiff's attorneys no later than 48 hours prior to the hearing. The hearing shall be held on February 20, 1996, at 1:00 p.m.

ORDERED, DONE and DATED this 9th day of February, 1996.

_____

Ronald R. Arneson,
Crow Tribal Court Special Judge

CROW COURT OF APPEALS
IN AND FOR THE CROW INDIAN RESERVATION
CROW AGENCY, MONTANA

Estates of Red Wolf and Bull Tail,

Plaintiffs/Respondents,

v.

Burlington Northern Railroad Company,

Defendant/Appellant.

Civ. App. Docket No. 94-31

February 21, 1996

Opinion & Order

Defendant Burlington Northern Railroad Company (the "Railroad") appeals from the February 9, 1996 Order of the Crow Tribal Court (Arneson, J.), denying the Railroad's motion for stay of execution on the $250 million judgment entered against it on February 6, requiring the Railroad to post a supersedeas bond pursuant to Crow R. Civ. P. 18(b), and setting a hearing for approval of the Railroad's proposed bond for February 20, 1996. In addition, Railroad applies to this Court for a stay of the judgment and a waiver of the requirement to post a surety bond pursuant to the guidance provided by Fed. R. App. P. 8(a).

Shortly after filing this appeal and application on February 12, the Railroad also filed an action in the U.S. District Court for the District of Montana, Cause No. CV 96-17-BLG-JDS. That Court on February 15, 1996, granted a Temporary Restraining Order enjoining Judge

Arneson and the plaintiffs from enforcing the judgment and ordering them to appear for a hearing on a permanent injunction on February 26, 1996. This is the second federal court TRO enjoining the conduct of Judge Arneson's duties since the beginning of the year issued upon the application of a litigant that was also pursuing its appellate review rights in this Court. *See Big Horn County Electric Cooperative, Inc. v. Adams, et al.*, Cause No. CV 95-194-BLG-JDS (TRO issued January 3, 1996; case dismissed February 15, 1996).

In support of its appeal and application, the Railroad argues that this case presents important questions of Tribal tort law, and under the Indian Civil Rights Act, (25 U.S.C. § 1302 *et seq.*), which should be briefed and decided "without the distraction of collateral enforcement litigation." The Railroad also argues that a bond is not warranted because of its obvious ability to pay the judgment, as evidenced by the financial statements attached to the Affidavit of Gary L. Crosby which was presented to the Tribal Court. Mr. Crosby is the Vice President--Litigation for Burlington Northern Santa Fe Corporation, which owns Burlington Northern Inc., which in turn owns Burlington Northern Railroad Company and its subsidiaries. According to the Form 10Q filed with the Securities Exchange Commission for the period ending September 30, 1995, the Railroad had net assets of $3.36 billion and year-to-date revenues of $4 billion and net income of $431 million. Crosby Aff. Exh. B. The Railroad rests its primary contention on the "well-settled" principle in the federal system that requiring it to post a bond in these circumstances amounts to an abuse of discretion by the lower court.

The plaintiffs filed an opposition to the Railroad's application on February 15, pointing out that it was premature because no notice of appeal had been filed, and that Railroad has not made a showing of its inability to obtain a bond. Plaintiffs urge this Court to defer to the Tribal Court's

discretion in this matter and acquire the Railroad to post a bond to ensure payment of the judgment.

This application also constitutes the third time the Railroad has sought interlocutory relief in this Court since January 3, 1996. Prior to this application, its concurring appeal of the Tribal Court's denial of Bonnie Little Nest's motion to intervene was dismissed as untimely; and its motion for emergency stay of proceedings, appealing several of the Tribal Court's pre-trial rulings, was dismissed on January 29, 1996, for lack of appellate jurisdiction over a final order or judgment. This application, too, must be denied as premature.

As a threshold matter, the Crow Rules of Appellate Procedure do not contain a rule expressly authorizing the Court of Appeals to stay a judgment or approve a supersedeas bond, as does Fed. R. App. P. 8(a). We approve the policy embodied in Rule 8, and followed by the judgment debtor here, of seeking relief in the first instance in the Tribal Court. We have also followed the provision in Fed. R. App. P. 8(a) allowing consideration of this application by a single judge of the Court of Appeals in these exceptional circumstances. In the case of a final judgment which is the *subject of a pending appeal* before this Court, the Tribal Court's *final orders* relating to stay of the judgment, and to the bond or other security given as a condition of the stay, are final orders subject to review by the Court of Appeals for abuse of discretion pursuant to Crow Tribal Code § 3-1-103(2) and Crow R. App. P. 1 and 3(a).

In this case, the judgment was not the subject of a pending appeal when the applications for stay were filed with the Tribal Court or this Court, or when the U.S. District Court issued its TRO at the Railroad's request. The provisions for staying the judgment and posting bond in Fed. R. Civ. P. 62(c) and Fed. R. App. P. 8 presuppose the existence of a valid appeal. 9 *Moore's Federal Practice* ¶ 208.06 at *8-16 (2d ed. 1995), citing Century Laminating Ltd. v. Montgomery*, 595 F. 2d 563 (10th Cir. 1979). The Railroad has since tendered a

notice of appeal dated February 16, 1996, which the Clerk duly filed on February 20.

Assuming the existence of a valid appeal, the Tribal Court's order lacks finality because the Tribal Court has not yet had the opportunity to exercise its discretion in approving a specific bond or in setting its amount. Moreover, the Railroad has not yet offered any evidence concerning the cost of a bond or its inability to obtain a bond of this size, nor has it proposed other forms or combinations of security for the Tribal Court's consideration. Even under the federal rules, "Rule 8 may not be used as a means of appealing a determination by the district court pursuant to Civil Rule 62, to which the appeals court will defer absent an abuse of discretion." 9 *Moore's Federal Practice* ¶ 208.04 at 8-13 (2d ed. 1995-96 Supp.). "We shall not use Rule 8 to undermine the district judge's discretion." *Lightfoot v. Walker*, 797 F. 2d 505, 507 (7th Cir. 1986). Adhering to this wise principle, the Court declines to review the Tribal Court's Order dated February 9, or to consider the Railroad's application for stay and waiver of bond until after the Tribal Court has entered final orders concerning the specific security required as a condition of a stay of the judgment.

Although we decline to review the Tribal Court's order at this time, because of the unusual size of the judgment and both parties' important interests in promptly resolving these issues, we provide general guidance in this opinion for the Tribal Court's further deliberations with respect to requiring security for the judgment during the pendency of the appeal.

As the Tribal Court noted, Rule 18(b) of the Crow Rules of Civil Procedure by its terms requires an appellant to post surety bond on or before the date of filing an appeal as a condition for obtaining a stay of execution of the judgment. In federal practice, too, posting a supersedeas bond in the amount of the judgment, plus interest, costs on appeal, and damages for the delay, is the normal requirement. *Poplar Grove, Etc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979)

(reversing the district court's requirement for a $10,000 bond on a $270,000 judgment and remanding to "establish some type of positive protection of the judgment creditor's rights" or to vacate the reduced bond). The purpose of the bond is to protect the non-appealing party against any loss sustained as a result of having to forego execution of the judgment pending the appeal. *Id.* It also allows the judgment creditor to "avoid the risk of satisfying the judgment only to find that restitution is impossible after reversal on appeal." *Id.* Thus, the ability to post a bond is a "privilege extended the judgment debtor," who in turn bears the burden to objectively demonstrate the reasons for departing from the requirement for a full security bond. *Id. See also, International Wood Processors v. Powder Dry, Inc.*, 102 F.R.D. 212 (D.S.C. 1984) (requiring $2.8 million bond for amount of judgment when appellant did not present financial information and most assets were located outside the district).

The federal courts have exercised discretion in reducing the amount of the bond, or providing for other forms of security, when circumstances warrant. See 9 *Moore's Federal Practice* ¶ 28.06[2] at 8-18. In *Poplar Grove*, the Fifth Circuit provided the following direction to the district court on remand:

> If a judgment debtor objectively demonstrates a present financial ability to facilely respond to a money judgment and presents to the court a financially secure plan for maintaining that same degree of solvency during the period of an appeal, the court may then exercise a discretion to substitute some form of guaranty of judgment responsibility for the usual supersedeas bond. Contrariwise, if the judgment debtor's present financial condition is such that the posting of a full bond would impose an undue financial burden, the court similarly is free to exercise a discretion to fashion some other arrangement for substitute security through an appropriate

> restraint on the judgment debtor's financial dealings which would furnish equal protection to the judgment creditor.

Poplar Grove, *supra*, 600 F.2d at 1191. Under this guidance from the Fifth Circuit, the judgment creditor is entitled to some effective form of security even if the district court decides to waive the requirement for a bond.

Other federal courts have waived the bond for solvent defendants in certain circumstances without requiring security. In *Federal Prescriptive Service v. American Pharmaceutical Ass'n.*, 636 F.2d 755, 760-61 (D.C. Cir. 1980), the court construed Fed. R. Civ. P. 62(g) and Fed. R. App. P. 8(a) to authorize an unsecured stay of a $102,000 judgment when (1) both parties were appealing on the merits, (2) the judgment debtor's net worth of $4.8 million was about 47 times the amount of the judgment, and (3) the judgment debtor was a long-time District resident. As noted above, the Crow Tribal Code does not contain similar provisions to the federal rules relied on in that case.

The Seventh Circuit has developed a five-part test for waiving the bond requirement. See *Dillon v. City of Chicago*, 866 F.2d 902, 904-905 (7th Cir. 1988). (The Tribal Court considered this test in reaching its February 9 Order requiring a bond.) The court in *Dillon* reversed the district court's requirement to transfer funds to the Clerk of Court in the full amount of the $115,360 employment discrimination judgment against the City of Chicago, having been persuaded that the City's previously appropriated $454 million payroll fund together with procedures which would normally ensure payment of the judgment within 30 days were sufficient security without the need for posting a bond. *Id.* at 905.

In another case arising in the Seventh Circuit, the district court in *In re Oil Spill by the Amoco Cadiz*, 744 F. Supp. 848, 850 (N.D. Ill. 1990), waived the bond requirement for Amoco and the Republic of France. With respect to

Amoco, the court based its waiver on the evidence that Amoco's quarterly net income was 3 times the amount of the judgment, and many of its assets were located within the United States. The court also noted that Amoco promised to file quarterly reports to assure the court of its continued ability to respond to the judgment. *Id.* at 850 n. 2. With respect to France, the court observed that bond was not necessary on the $35 million judgment in favor of Amoco, because France also had a $100 million judgment against Amoco that could be used to offset its liability. *Id.* In contrast, the court required the other judgment debtor, Astilleros Expanole, to post a bond because it had no assets within reach of the federal court, and had consistently refused to recognize the court's jurisdiction during the course of proceedings in that case. *Id.* at 850-51. This latter holding was relied upon by the Tribal Court in its February 9 order.

In other cases involving judgment debtors with large assets, the Seventh Circuit has insisted on a bond or other adequate security. In *Lightfoot v. Walker*, 797 F.2d 505, 506 (7th Cir. 1986), the court required the State of Illinois to post a full bond on a $710,501 attorneys' fee judgment when the procedure for collecting a judgment against the state was cumbersome, time-consuming and uncertain, since it could not be paid until the legislature appropriated the funds. The court also observed that the only offsetting concern was the cost of the bond, usually one percent or $7,000, which was only "a modest amount." *Id.* at 507.

In *Olympia Equipment v. Western Union Telegraph Co.*, 786 F.2d 794 (7th Cir. 1986), Judge Posner, writing for the court, affirmed the district court's waiver of bond on a $36 million judgment against Western Union when the district court provided for adequate alternate security arrangements. Western Union Telegraph, the principal subsidiary of Western Union Company (similar to the relationship between the Railroad and Burlington Northern Inc. in this case), had total assets worth $2

billion, but was financially distressed and illiquid, and claimed it was unable to obtain a bond. *Id.* at 796. The alternate security arrangements consisted of pledges of (1) $10 million in cash, (2) $10 million in accounts receivable, and (3) a security interest in some of the company's physical assets purportedly worth $70 million. *Id.* Before turning to the fundamental issue of the adequacy of the alternate security, the Court of Appeals questioned the company's inability to obtain a bond if it had offered to pay more than the customary 1% fee, and likewise questioned the parties' failure to explore the possibility of a partial bond that would secure only the compensatory damages portion of the judgment (e.g., $12 million). *Id.* at 797. The court then noted a more serious problem with the district court allowing the telegraph company to transfer cash to its parent, who ordinarily would not be liable to the judgment creditor. *Id.* at 798. In light of a pending sale of a division of the telegraph company, the court modified the district court's order and forbid any cash transfers to the parent unless the parent agreed to be bound on the judgment to the extent of the transfers (or the parent posted its own bond in this regard). *Id.* at 799.

In a case involving one of the largest federal court judgments in its time, the U.S. District Court for the Southern District of New York in 1970 allowed alternate security as a condition for staying TWA's $145 million antitrust default judgment against Hughes Tool Co. *See Trans World Airlines, Inc. v. Hughes*, 515 F. 2d 173, 175 (2d Cir. 1975). The course of the proceedings to determine the form of security may be instructive in this case. In *Hughes*, the court held a "number of hearings at which TWA and Toolco [Hughes] expressed their diametrically opposed positions with respect to the need for a bond to protect the judgment pending appeal." *Id.* at 176. Hughes, with a $500 million net worth, argued against any bond, and offered instead to create a lien on specific property valued at $45 million (the amount of the compensatory damages). *Id.* TWA insisted upon a bond in the full amount of

$161 million as provided by the local rules. *Id.* at 176-177. After concluding that posting the full supersedeas bond was not practicable under the circumstances, the district court allowed alternate security arrangements in the form of (1) a $75 million letter of credit in favor of TWA (in lieu of a bond), and (2) the $86 million balance secured by Hughes' commitment to maintain Toolco's net worth at three times that amount (or $335 million). *Id.* at 177. Compliance with this latter commitment would be certified by quarterly audited balance sheets. *Id.* At the court's direction, and "[a]fter the usual sparring," the parties came up with the details of this alternate security arrangement. *Id.*

The Second Circuit's decision in *Trans World Airlines v. Hughes, supra*, stands for the proposition that it is not always to the Appellees' advantage to insist on a large bond regardless of Appellant's cost. *See also*, 9 *Moore's Federal Practice* ¶ 208.06[2] at 18-19. After the Hughes defendants obtained a reversal by the U.S. Supreme Court, the district court awarded as costs on appeal, pursuant to Fed. R. Civ. P. 39(a) and (e), the $1,015,625 fee incurred by the Hughes defendants for the $75 million letter of credit (at one-half percent per annum). *Hughes* 515 F. 2d at 175. On appeal, the Second Circuit also allowed as costs taxable against TWA the $617,765 charges incurred for the quarterly audits, because they represented a cost-effective substitute security for the $86 million balance secured by the company's net worth, and this alternative was cheaper than the premium for a supersedeas bond or the fee for a letter of credit. *Id.* at 177-78. Although we are not called upon here to speculate as to the possibility of a discretionary award of costs on appeal under Crow R. App. P. 15 if the judgment is reversed or modified, it is worth noting that plaintiffs/appellees in this case bear some degree of exposure to liability for reimbursing some of the Railroad's costs of providing adequate security for the judgment.

Finally, the federal courts' treatment of security for Pennzoil's $11.1 billion judgment against Texaco awarded by the state district court in Houston, Texas, bears mentioning. *See Pennzoil Company v. Texaco, Inc.*, 481 U.S. 1, 4 (1987). In that case, even before the Texas court's judgment was entered, Texaco filed a separate action in the U.S. District Court for the Southern District of New York to enjoin enforcement of the judgment. Id. at 6 n. 5. Texaco argued that the apparently mandatory bond requirements of Texas law, together with other rights of a Texas judgment creditor, violated various federal statutes and its constitutional rights. *Id.* at 6. The district court accepted jurisdiction and granted a preliminary injunction, but conditioned the injunction on Texaco's posting *a bond in the amount of $1 billion*. *Id.* at 8 n. 7. Thus, although it only partially secured the judgment, a bond of this size was authorized by a federal district court even when it found that Texaco's appeal had a reasonable probability of success, *id.* at 8, and Texaco's assets were admittedly sufficient to satisfy the judgment without liens or a bond, *id.* at 19-20 (Brennan, J., concurring). The Second Circuit subsequently affirmed, but the Supreme Court reversed, holding that the federal courts should have deferred to the interests of allowing state courts to enforce their own judgments, based on principles of comity. *Id.* at 17.

Applying these teachings to the facts developed thus far in the instant case, we find that it is not at all "well settled" that the Railroad would be entitled to a waiver of the supersedeas bond under federal law. The Railroad's reported net assets as of September, 1995, were to 13 times the amount of the judgment. Crosby Aff. Exh. B ($3.36 billion divided by $250 million). Its average quarterly net income during 1995 was less than 60% of the amount of the judgment, and the $29 million in cash and cash equivalents reported on its balance sheet represents less than 12% of the amount of the judgment. *Id.* These ratios are substantially less than the ones involved in *Federal Prescriptive Service* (net assets of 47 times the

judgment), *Dillon* ($454 million payroll fund to satisfy $115,000 judgment), and *Amoco Cadiz* (quarterly net income of 3 times amount of judgment), *supra*, in which the federal courts waived the requirement for a supersedeas bond. Of particular concern is the Railroad's failure to explain in even general terms how it would come up with an additional $220 million in cash to pay the judgment (plus costs and postjudgment interest).

The Railroad is part of a complicated corporate structure involving multiple layers of subsidiaries, Crosby Aff. Exh. B, in an industry that has undergone substantial restructuring (witness BN's recent merger with Santa Fe). Against this backdrop, the Railroad has not made any representations about maintaining its net worth or its liquidity to pay the judgment, nor has it offered any protections against large amounts of its assets being transferred to its parent or some other entity in connection with a merger or acquisition. In this rapidly-changing world, it would be naive to blindly assume that the Railroad will necessarily have sufficient assets reasonably available to respond to a judgment of this size if the judgment is ultimately affirmed after what could be several years of further litigation. In these circumstances, the federal courts have required varying degrees of assurances in lieu of posting the full amount of the bond. *See Amoco Cadiz* (quarterly financial statements), *Olympia Equipment* (pledges of specific property and cash transfers to parent conditioned on assuming liability for judgment), and *Hughes* (quarterly certifications that net worth continued to exceed 3 times the amount of judgment), *supra*.

Finally, based on the record before us, the Tribal Court's concerns with the Railroad's refusal to recognize its jurisdiction do not appear to be unreasonable. Rather than offering any assurances of payment in lieu of a bond, the Railroad in its application to this Court has remained extremely equivocal

about the plaintiffs' ability to enforce its Tribal Court judgment in the other courts of the land:

> It is not uncommon for litigants to *attempt* to enforce tribal judgments in either state or federal courts and thus, the assets of Burlington Northern *may* be within reach of this court *if* the judgment is enforced in either federal or state court.

Railroad's Application dated February 12, 1996 at 6 (emphasis added). Judge Hatfield's recent decision in *Wilson v. Marchington and Inland Empire Shows*, 20 Mont. Fed. Reptr. 297 (Jan. 24, 1996), may help alleviate this concern, but leaves plenty of room for further argument under the specific facts of each case. The Railroad's obtaining a TRO from the U.S. District Court before it had even perfected its appeal suggests that it intends to make use of every possible opportunity to resist execution of the judgment should it be sustained on appeal.

In view of the foregoing, we provide the following guidance to the Tribal Court with respect to further proceedings on adequate security arrangements as a condition of the stay requested by the Railroad:

1. Rule 18(b) of the Crow Rules of Civil Procedure by its terms requires Railroad to post a surety bond "sufficient to guarantee performance of the judgment, and payment of costs on appeal." In view of the size of this judgment, however, and the possible unavailability or prohibitive costliness of obtaining a bond, the Tribal Court should consider some combination of a bond and adequate alternate security. These could include a properly structured letter of credit, posting of cash or negotiable government securities, pledges of specific physical assets, express guaranty of payment, maintenance of a specified net worth, and/or protections against transfers of liquid assets, as described in the cases, *supra*. In any event, we believe that Rule 18(b) requires that at least a substantial

portion of the judgment should be secured by a supersedeas bond, and the remainder of the judgment should be fully secured. The Railroad bears the burden of demonstrating that alternate forms of security will provide protections equivalent to those afforded by a surety bond.

2. Upon a proper showing by the Railroad of the cost and difficulty in obtaining a bond, the Tribal Court should conduct such further hearings as are reasonably necessary to determine adequate security arrangements. Stipulations by the parties as to the details of those arrangements should be encouraged. However, since delay in posting security works to the disadvantage of plaintiffs, an immediate partial bond should be the prerequisite for extending the stay until all the security arrangements are resolved.

3. The Tribal Court's ultimate determinations on the stay and security arrangements will be treated with great deference by this Court.

4. Based on principles of comity, the Tribal Court should stay all proceedings to actually execute on the judgment and any requirement for actually posting security during the pendency of any restraining orders issued by the U.S. District Court. However, we do not read that Court's TRO as preventing the Tribal Court from conducting further proceedings to determine the form of security. In fact, since the TRO has the effect of staying the judgment without any security, the Tribal Court should proceed to make its determinations so that the security arrangements (at least a substantial partial bond) may be implemented immediately upon the lifting of any restraining orders by the U.S. District Court.

IT IS HEREBY ORDERED that the Railroad's application for stay of judgment and waiver of supersedeas bond is DENIED.

DONE AND DATED this 21 day of February, 1996.

_____

William C. Watt
Judge, Crow Court of Appeals

FIFTIETH CONGRESS. SESS. II. CH. 134. 1889.

(25 Stat. 660)

CHAP. 134.—An act granting to the Big Horn Southern Railroad Company a right of way through a part of the Crow Indian Reservation in Montana Territory.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a right of way is hereby granted, as hereinafter set forth, to the Big Horn Southern Railroad Company, a corporation duly organized and existing under the laws of the Territory of Montana, for the construction, operation, and maintenance of its railroad, telegraph, and telephone line through the lands set apart for the use of the Crow Indians, and commonly known as the Crow Indian Reservation, beginning at a point on the Northern Pacific Railroad, in the vicinity of the mouth of the Big Horn River, in Yellowstone County, Montana Territory; thence by the most practicable route up said Big Horn River to or near the mouth of the Little Big Horn River; thence up said Little Big Horn River to or near the mouth of Owl Creek; thence up said creek to and across the southern boundary-line of said reservation.

SEC. 2. That the right of way hereby granted to said company shall be seventy-five feet in width on each side of the central line of said railroad, as aforesaid; and said company shall also have the right to take from said lands adjacent to the line of said road material, stone, earth, and timber necessary for the construction of said railroad; also ground adjacent to said right of way for station buildings, depots, machine-shops, side-tracks, turn-outs, and water stations, not to exceed in amount three hundred feet in width and three thousand feet in length for each station, to the extent of one station for each ten miles of its road, except at the terminus of said road at a point on the Northern Pacific Railroad in the vicinity of the mouth of the Big Horn River, Yellowstone County, Montana, and at such point not to exceed one hundred and sixty acres, or so much

thereof as the Secretary of the Interior shall decide to be reasonably necessary for terminal facilities.

SEC. 3. That it shall be the duty of the Secretary of the Interior to fix the amount of compensation to be paid the Indians for such right of way, and grounds adjacent thereto, as provided in section two, and provide the time and manner for the payment thereof; and also to ascertain and fix the amount of compensation to be made individual members of the tribe for damages sustained by them by reason of the construction of said road; but no right of way shall vest in said railroad company in or to any of the right of way herein provided for until plats thereof, made upon actual survey for the definite location of such railroad, and including the points for station buildings, depots, machine-shops, side-tracks, turn-outs, and water stations, shall be filed with and approved by the Secretary of the Interior, which approval shall be made in writing and be open for the inspection of any party interested therein, and until the compensation aforesaid has been fixed and paid; and the surveys, construction, and operation of such railroad shall be conducted with due regard for the rights of the Indians and in accordance with such rules and regulations as the Secretary of the Interior may make to carry out this provision: *Provided*, That the President of the United States may, in his discretion, require that the consent of the Indians to said right of way shall be obtained by said railroad company, in such manner as he may prescribe, before any right under this act shall accrue to said company.

SEC. 4. That said company shall not assign or transfer or mortgage this right of way for any purpose whatever until said road shall be completed through that part of said reservation through which it shall be constructed: *Provided*, That the company may mortgage said franchise, together with the rolling stock, for money to construct and complete said road: *And provided further*, That the right granted herein shall be lost and forfeited by said company unless the road is

constructed and in running order through said reservation on said line within two years from the passage of this act, or if the consent of the Indians is required under the terms of the proviso to section three of this act, then within two years from the date when such consent shall be obtained as provided in section three of this act.

SEC. 5. That the said railroad company shall accept this right of way upon the expressed condition, binding upon itself, its successors and assigns, that they will neither aid, advise, nor assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their land, and will not attempt to secure from the Indian tribes any further grant of land or its occupancy than is hereinbefore provided: *Provided*, That any violation of the condition mentioned in this section shall operate as a forfeiture of all the rights and privileges of said railroad company under this act.

SEC. 6. That said railroad company shall have the right to survey and locate its road immediately after the passage of this act.

SEC. 7. That Congress may at any time amend, add to, alter, or repeal this act.

Approved, February 12, 1889.

Supreme Court, U.S.
FILED
JUN 23 1997
OFFICE OF THE CLERK

No. 96-1853

In The

Supreme Court of the United States

October Term, 1996

BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

vs.

ESTATES OF RED WOLF AND BULL TAIL, VALERIE RED WOLF, GLADYS RED WOLF, RANDY RED WOLF, DORRIE BULL TAIL, DEWEY BULL TAIL, AND RON ARNESON, CROW TRIBAL COURT SPECIAL JUDGE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth District

BRIEF IN OPPOSITION FOR RESPONDENT RON ARNESON

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QUESTION PRESENTED

The question raised by this Petition for Writ of Certiorari is whether this Court needs to reiterate the "exhaustion rule" as it applies to tribal courts. The rule was first announced by this Court in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856-857 (1985); stated again in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987); and most recently explained and reaffirmed in *Strate v. A-1 Contractors*, __ U.S. __, 117 S. Ct. 1404 (1997). The United States Court of Appeals for the Ninth Circuit correctly applied the exhaustion rule in this case. Specifically, the Ninth Circuit dissolved a United States District Court injunction on the grounds that it interfered with the Crow Tribal Court's authority to set proper conditions for supersedeas bond on a Crow Tribal Court judgment.

LIST OF INTERESTED PARTIES

The Petitioner is Burlington Northern Railroad Company, hereafter referred to as "**BN**".

The Respondents are:

The Estates of Red Wolf and Bull Tail, Valerie Red Wolf, Gladys Red Wolf, Randy Red Wolf, Dorrie Bull Tail, and Dewey Bull Tail, hereinafter referred to as the "**Estates of Red Wolf and Bull Tail**"; and

Ron Arneson, Crow Tribal Court Special Judge, hereinafter referred to as "**Judge Arneson**".

The Estates of Red Wolf and Bull Tail have representation separate from Judge Arneson.

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APPENDIX

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Appendix B — Opinion and Order of the Crow Court of Appeals for the Crow Indian Reservation, Crow Agency, Montana Dated June 17, 1997 ..... 6a

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit, from which BN seeks a writ of certiorari, is reported at 106 F.3d 868. (Pet. App. 1a-15a). The Opinion of the United States District Court is unreported, but is attached to BN's Petition as Pet. App. 16a-23a. Recent decisions of the Crow Court of Appeals on reduction of the travel court judgment and setting supersedeas bond conditions are attached to this brief as Resp. Arneson App. 1a-5a & 6a-13a.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the final decisions of the United States Court of Appeals for the Ninth Circuit upon Petition for Writ of Certiorari in accordance with 28 U.S.C. § 1254(1). Judge Arneson concurs with BN that the Ninth Circuit issued a final decision and that BN's Petition to this Court was timely filed. Therefore, this Court has jurisdiction to consider the Petition and to review the opinion of the Ninth Circuit should certiorari be granted.

It is Judge Arneson's position that the Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

A. Introduction

This case questions the propriety of the United States District Court's intervention in on-going litigation in the Crow Tribal Courts. The District Court entered an injunction staying enforcement of the tribal judgment, including any action requiring the posting of supersedeas bond by the BN.

B. Events Leading to Litigation

This case arises out of a collision between a BN freight train and a private automobile operated and occupied by enrolled

members of the Crow Tribe. The collision occurred on the Crow Tribal Reservation at the intersection of a highway thereon and a BN right of way. Two members of the Crow Tribe of Indians were killed in the collision. Their estates and heirs filed suit in Crow Tribal Court on February 8, 1994.

C. Proceedings in Tribal Courts and United States District Court

Judge Arneson, Special Judge of the Crow Tribal Court, assumed jurisdiction over the case. During pretrial proceedings, BN challenged the tribal court's jurisdiction by filing suit in the United States District Court. On November 3, 1994, the District Court ruled that the Crow Tribal Court should exercise jurisdiction over the case, and that intervention by the District Court was inappropriate under the exhaustion rule.

Judge Arneson presided over extensive pretrial and trial proceedings which resulted in a jury verdict of liability and compensatory damages totaling $250 million. The Estates of Red Wolf and Bull Tail filed a motion to reduce the judgment to $25 million. The Crow Court of Appeals has issued an order dated June 17, 1997 ordering the Crow Tribal Court to reduce the judgment to $25 million, without prejudice to BN's right to seek full review of the amended judgment. (Resp. Arneson App. 1a-5a).

In response to the jury verdict, BN filed post-trial motions with the Crow Tribal Court, a motion with the Crow Court of Appeals, an interlocutory Notice of Appeal to the Crow Court of Appeals before judgment was entered, and a Notice of Appeal after judgment was entered. For the second time, BN filed suit in United States District Court, wherein it sought to enjoin enforcement of the judgment, and restrain action by the Crow Tribal Court on the question of supersedeas bond or security for the judgment.

BN's second suit named Judge Arneson as a Defendant. Judge Arneson appeared, through counsel, in the District Court and in the Ninth Circuit to assert the Crow Tribal Court's authority in this matter and to prevent interference by the District Court while the litigation was pending before the Crow Tribal Court.[1]

Judge Arneson attempted to hold a hearing on the question of BN's supersedeas bond. This was a futile effort because, by the time of that hearing, the District Court had issued its Temporary Restraining Order. Subsequently, BN refused to discuss any aspects of a supersedeas bond. Judge Arneson had no alternative but to issue an order requiring a full supersedeas bond. (Pet. App. 24a-28a). The Crow Court of Appeals issued an order giving guidance to Judge Arneson on handling the supersedeas bond. (Pet. App. 29a-42a). Judge Arneson was unable to fully comply with this order because by that point, a Preliminary Injunction had been entered. (Pet. App. 16a-23a). As a result, BN refused to post any bond in the Crow Tribal Court. The United States District Court's Preliminary Injunction allowed BN to post a $5 million injunction bond in lieu of supersedeas bond required by the Crow Tribal Court. The Crow Court of Appeals ruled on June 17, 1997 that BN shall post bond of $30 million to obtain stay of execution of the amended judgment provided that there shall be no execution until BN receives Federal Court review of the judgment. (Resp. Arneson App. 6a-13a). There has been no final determination of the judgment against BN, as the matter remains on appeal before the Crow Court of Appeals.

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1. Judge Arneson takes no position herein on the contentions of either BN or the Estates of Red Wolf and Bull Tail regarding the propriety of the trial proceedings, jurisdiction of the Tribal Court, and other issues which are presently pending before the Crow Court of Appeals or the Crow Tribal Court in pending post-trial motions. Those matters shall be decided by the appropriate Tribal Court.

D. Proceedings in Ninth Circuit Court of Appeals

The Ninth Circuit reversed the District Court. It ruled that the District Court erred in enjoining the Crow Tribal Court proceedings before tribal court remedies had been exhausted. The Ninth Court held that the case was governed by the exhaustion rule announced by this Court in *National Farmers* and *Iowa Mutual*. The Ninth Circuit held that BN presented no exception to the exhaustion rule.

REASONS FOR DENYING THE WRIT

I.

NO SPECIAL OR IMPORTANT REASONS FOR CERTIORARI.

Review on writ of certiorari is to be granted only when there are special and important reasons. Supreme Court Rule 17. Such special and important reasons have been identified by this Court as including issues of constitutional dimension, conflict between the courts of appeal, conflicts between the courts of appeal and the Supreme Court, important questions relating to the administration and enforcement of federal law, cases of important public interest, and cases presenting novel federal questions. *See, e.g., Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955); *Bingler v. Johnson*, 394 U.S. 741 (1969); *Egan v. City of Aurora*, 365 U.S. 514 (1961); *Donaldson v. United States*, 400 U.S. 517 (1971); and *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961).

In this case, there is no constitutional issue presented. The ruling of the Ninth Circuit applying the exhaustion rule does not conflict with the decisions of other circuit courts, nor does it conflict with any decision of this Court. Rather, it explicitly

follows the decisions of this Court in *National Farmers*, *Iowa Mutual*, and *A-1 Contractors*. The case does not involve any question of the administration or enforcement of federal statutes. It is not of any great public interest. The case does not present any novel questions.

The case is of interest only because of the size of the original judgment. However, that is a matter of interest only to the parties. Moreover, the amount of the judgment has been reduced, is under review within the Crow Tribal Court system, and it is not final at this point.

Accordingly, the case presents none of the special reasons required for granting writ of certiorari.

II.

NINTH CIRCUIT CORRECTLY APPLIED EXHAUSTION RULE.

In *National Farmers*, 471 U.S. at 855-857 and *Iowa Mutual*, 480 U.S. at 15-19, this Court established the exhaustion rule. Under this rule, federal courts are to refrain from interfering with tribal court proceedings, including questions of tribal jurisdiction, until such proceedings have been fully litigated and decided by tribal courts:

> Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover, the orderly

> administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of Tribal Court remedies, moreover, will encourage Tribal Courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

National Farmers, 471 U.S. at 856-857 (footnotes omitted).[2]

Strate v. A-1 Contractors, 117 S. Ct. 1404, decided by this Court only two months ago, reaffirmed the validity and importance of the exhaustion rule when no cause can be shown for immediate federal court intervention. *See id.*, 117 S. Ct. at 1411. This Court, in commenting upon its previous analysis in *National Farmers*, recognized the need to defer to a tribal court's capacity to review and explain the basis for tribal court jurisdiction. This Court emphasized that the exhaustion rule,

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2. After tribal remedies have been exhausted, the federal courts can review the federal law issues of tribal jurisdiction decided by the tribal courts. *National Farmers*, 471 U.S. at 856-857; *Iowa Mutual*, 480 U.S. at 15-19; *see also FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991); *Sanders v. Robinson*, 864 F.2d 630 (9th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989).

enunciated in *National Farmers* and *Iowa Mutual*, was not altered by its decision in *A-1 Contractors*. *See id.*, 117 S. Ct. at 1413. The Ninth Circuit's decision in the present case correctly and carefully applies the exhaustion rule established in *National Farmers* and *Iowa Mutual* and recently restated in *A-1 Contractors*.

The Ninth Circuit began its analysis with a restatement of the holdings of *National Farmers* and *Iowa Mutual*, which mandate that federal courts defer to tribal courts as a matter of comity. This deference extends to the tribal appellate process, as well as the trial courts of the tribal court system. *National Farmers*, 471 U.S. at 857; *Iowa Mutual*, 480 U.S. at 17. The Ninth Circuit acknowledged that under certain circumstances it is appropriate for the District Court to intercede in a tribal court matters, but those exceptions are limited. Those exceptions, set forth in *National Farmers* and cited by the Ninth Circuit, are three-fold: (1) is the assertion of tribal court jurisdiction motivated by a desire to harass or conducted in bad faith? (2) is the action one which patently violates express jurisdictional prohibitions? or (3) is exhaustion futile because of a lack of adequate opportunity to challenge the tribal court jurisdiction? (Pet. App. 7a-8a). These three exceptions were recently underscored in *A-1 Contractors*.

The Ninth Circuit held that BN was required, but failed, to show that any of the three established exceptions applied, citing *National Farmers* and *Crawford v. Genuine Parts Co., Inc.*, 947 F.2d 1405, 1408 (9th Cir. 1991), *cert. denied*, 502 U.S. 1096 (1992). The party asserting an exception to the exhaustion rule has the burden of alleging and proving the exception. In this case, no proof appears in the record that an exception applies. Therefore, the Ninth Circuit appropriately held that the District Court's intervention was premature.

BN tried to justify the District Court's intervention on grounds that BN could not risk posting a bond or other security in tribal court, as such action might lead to an enforcement of the judgment on the reservation, thereby making alleged due process violations at trial ineligible for federal review. The Ninth Circuit rejected BN's characterization of this argument as coming within the "futility" exception, noting that BN was assured of federal review of tribal court jurisdiction. The Ninth Circuit's construction of the "futility" exception is consistent with related holdings of the Eighth Circuit. *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1421 (8th Cir. 1996); *Reservation Tel. Coop. v. Three Affiliated Tribes*, 76 F.3d 181, 185-186 (8th Cir. 1996) and *Duncan Energy Corp. v. Three Affiliated Tribes*, 27 F.3d 1294, 1300-1301 (8th Cir. 1994), *cert. denied*, 513 U.S. 1103 (1995). Appropriately, the Ninth Circuit directed the District Court to "stay its hand" pending the exhaustion of Crow Tribal Court proceedings or alternatively, to dismiss BN's action without prejudice. (Pet. App. 9a).

This case is an excellent example of the need for adherence to the exhaustion rule. Before the trial court had an opportunity to rule on the supersedeas bond question and consider post-trial motions, and before the Crow Court of Appeals had reviewed those issues, the parties and the tribal judge became embroiled in federal court litigation and were subjected to a temporary restraining order and preliminary injunction, followed by an appeal to the Ninth Circuit. The plethora of motions and briefs, and the multiple forum litigation has created a "procedural nightmare"[3] The role and authority of the Crow Tribal Court has been severely undermined. The Ninth Circuit's decision dissolving the injunction ended the nightmare and restored procedural correctness to the litigation.

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3. *See National Farmers*, 471 U.S. at 856-857.

The exhaustion rule is derived, in part, from congressional policy to support and respect tribal self-government and its legal institutions. *Iowa Mutual*, 480 U.S. at 16-17. It gives the tribal court full opportunity to determine those instances in which its exercise of jurisdiction may or may not be appropriate, and to evaluate the factual and legal bases for the challenge. *National Farmers*, 471 U.S. at 856. The District Court's intervention in this case clearly violated these underlying policies. The Ninth Circuit was correct in ending that intervention.

III.

CIRCUMVENTION OF EXHAUSTION RULE TO DECIDE JURISDICTION IS INAPPROPRIATE.

BN argues that either this Court, on certiorari, or the United States District Court, on remand, should determine that the Crow Tribal Court's exercise of jurisdiction over the case is incorrect under the teachings of *A-1 Contractors*. BN asserts that because this case is so clearly similar to *A-1 Contractors*, exhaustion is not required, and it would be a waste of time and resources to have the jurisdictional issue decided by the Crow Tribal Court. This argument is directly contrary to this Court's pronouncements in *Iowa Mutual*, 480 U.S. at 17:

> At a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts.

Further, while Judge Arneson does not take a position on the merits of BN's latest jurisdictional assertion, *A-1 Contractors* appears to involve facts and procedural background which are very different from those in the litigation initiated by the Estates of Red Wolf and Bull Tail. On-going tribal court proceedings in

A-1 Contractors were not involuntarily halted by the District Court's actions, as they were in the present case. Mrs. Fredericks, the injured plaintiff in *A-1 Contractors*, was not a tribal member, whereas two tribal members were killed in the accident leading to the Estates of Red Wolf and Bull Tail litigation. In *A-1 Contractors*, the automobile accident occurred on a North Dakota state highway which traversed the reservation, while the decedents in the present case were killed at an intersection of a BN railroad crossing and road maintained by the Crow Tribe.

BN's arguments in its Petition for Writ of Certiorari do not mention or analyze the impact of *United States v. Soldana*, 246 U.S. 530, 532-533 (1918). In that case, this Court held that the Crow Tribe retains title to the land beneath the railroad right-of-way crossing the Reservation. Unlike the situation in *A-1 Contractors*, it appears that the Crow Tribe did not abdicate its right to control the land underlying the BN's railroad crossing, nor was the Crow Tribe's title to the underlying land extinguished by the railroad right of way.

BN's jurisdictional arguments do not analyze the effect and import of the language contained in the Congressional Act, 25 Stat. 660, which created the right of way and required the railroad to conduct operations "with due regard to the rights of the Indians." (Pet. App. 44a). There was no such duty in the right of way language at issue in *A-1 Contractors*.

All of these differences must be considered and reviewed by the Crow Tribal Courts prior to review by the federal courts under the exhaustion rule.

BN has challenged the tribal court's jurisdiction in its appeal to the Crow Court of Appeals. The Crow Tribal Courts are fully capable of carefully examining and properly resolving BN's jurisdictional challenges. According to *National Farmers*,

". . . an orderly administration of justice in the federal courts will be served by allowing a full record to be developed in the tribal court before either the merits or any question concerning appropriate relief is addressed." 471 U.S. at 856. The Crow Tribal Courts will have the full benefit of this Court's decision in *A-1 Contractors* when it responds to BN's objections to the tribal court's acceptance of jurisdiction over this case. Until that process is completed, the exhaustion rule requires that the federal courts not interfere.

CONCLUSION

No special or important question has been presented by BN which merits granting BN's Petition for Writ of Certiorari under Supreme Court Rule 17. The Ninth Circuit correctly applied established precedent of this Court in analyzing whether the District Court properly intervened in pending litigation before the Crow Tribal Court. The Ninth Circuit correctly determined that the United States District Court should "stay its hand" until Crow Tribal Court remedies were exhausted, under the principals enunciated by this Court in *National Farmers*, *Iowa Mutual* and, most recently, *A-1 Contractors*. The Ninth Circuit correctly determined that none of the three established exceptions to the exhaustion rule applied. Accordingly, it did not err when invalidating the District Court's actions during the pendency of the Crow Tribal Court proceedings.

BN is wrong when it suggests that under *A-1 Contractors*, the jurisdictional question presented in this case should be decided in the federal courts, without deference to the process pending before the Crow Tribal Court. The facts and procedural background of *A-1 Contractors* are clearly distinguishable from the present case. Further, a decision on the jurisdiction question, before a complete review and analysis by the tribal courts, is in direct contravention of this Court's holdings in *Iowa Mutual* and *National Farmers*.

This case was correctly decided by the Ninth Circuit. There is no basis for BN's Petition for Writ of Certiorari. The Petition should be denied in order to allow this case to be properly resolved and disposed of in the first instance by the Crow Tribal Courts, and then reviewed, as may be appropriate, by the federal courts.

Respectfully submitted,

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Dated: June 23, 1997

APPENDIX A — PROCEDURAL ORDER OF THE CROW COURT OF APPEALS FOR THE CROW INDIAN RESERVATION, CROW AGENCY, MONTANA DATED JUNE 17, 1997

IN THE CROW COURT OF APPEALS
IN AND FOR THE CROW INDIAN RESERVATION
CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 97-010

ESTATES OF RED WOLF and BULL TAIL,

Plaintiffs-Appellees,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Defendant-Appellant.

LIMITED REMAND ORDER AND REVISED ORDER GOVERNING CONDUCT OF APPEAL

The parties having filed briefs regarding the procedural questions raised in the Court's Order Governing Conduct of Appeal dated February 6, 1997, the Court issues this revised order which, for convenient reference, replaces the previous order in its entirety. A separate order is being issued concurrently regarding the stay of the amended judgment and the supersedeas bond. Now, therefore,

IT IS HEREBY ORDERED that:

1. This case is REMANDED to the Tribal Court for the

limited purpose of entering an amended judgment *nunc pro tunc* (i.e., retroactive to the date the original judgment was entered) in the amount of $5 million per heir, or $25 million total, plus post-judgment interest at ten percent (10%) per annum from February 6, 1996. The Tribal Court's inquiry on remand shall be limited to the sufficiency of the plaintiffs' affidavits consenting to the reduced judgment, which were filed with the Tribal Court during March, 1997, or such other evidence of the plaintiffs' knowing consent that the Tribal Court deems necessary. The judgment shall recite that it is without prejudice to the defendant's right to seek full review of the amended judgment.

IT IS FURTHER ORDERED that:

2. The parties in their appellate briefs shall address any issues they deem pertinent with respect to the Tribal Court's jurisdiction in light of the Supreme Court's decision in *Strate v. A-1 Contractors*, __ U.S. __, 117 S. Ct. 1404 (1997).[1] The parties may supplement the record with copies of such public records as they believe are relevant to the jurisdictional inquiry, including but not limited to treaties, statutes, Tribal ordinances, and right-of-way documents. These materials shall be set forth in a separate appendix annexed to the briefs.

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1. Based on our initial reading, Tribal Court jurisdiction in this case is not controlled by the Court's recent decision in *Strate v. A-1 Contractors*. The defendant's ownership and use of its right-of-way differs fundamentally from a motorist's use of a state highway, and has different implications for the exceptions to the Montana test, if that test applies here at all. Moreover, because of the nature of these differences and appellant's long-term and continuing presence on the Reservation, the Tribal Court's assertion of jurisdiction in this case does not require the railroad to defend in an "unfamiliar court." *Id.*, 117 S. Ct. at 1416. We therefore do not regard this case as one where it is evident that the Tribal Court lacks jurisdiction and the Federal court exhaustion requirement does not apply. *Id.* at 1416 n. 14.

Appendix A

IT IS FURTHER ORDERED that:

3. The official caption of this appeal and the docket number shall remain as they appear in the caption of this order for all appellate proceedings subsequent to the entry of the amended judgment. The Appellant's notice of appeal shall be deemed to be timely filed, without the necessity of filing another notice of appeal.

4. The schedules for transmitting the record and filing briefs under Rules 8 and 10 of the Crow Rules of Appellate Procedure are VACATED, and those schedules shall be governed by order of the court, including this order.

5. The record on appeal shall be transmitted promptly *after* the Tribal Court enters the amended judgment. One complete copy of the record, together with the original exhibits, shall be transmitted to the Court of Appeals pursuant to Crow R. App. P. 8(b). Except as listed in below, the record on appeal shall consist of the items listed in Crow R. App. P. 7(a), and the transcripts of the Tribal Court proceedings shall be in written form only.

(a) A copy of the videotape of Hon. Donald Stewart's address to the venire (*see Burlington Northern Railroad Company v. Red Wolf*, 106 F.3d 868, 872 (9th Cir., 1997) (Kleinfeld, J., dissenting), shall be included in the record. No other videotapes shall be included in the record on appeal.

(b) A transcription of the audiotapes of proceedings prior to December 12, 1994 (*see* BN's procedural brief at 11), shall be included in the record, or a statement thereof

as provided in Crow R. App. P. 7(b). The appellant shall be responsible for preparing the transcription or statement.

(c) Transcripts of any proceedings or statements in the Crow language shall include translations into English certified by the translator, and the record shall include any such translations submitted prior to the date of transmission.

(d) The costs of transcripts, a certified translation, and of duplicating one complete copy of the record pursuant to Crow R. App. P. 8(a) and (b) shall be paid or reimbursed by Appellant upon its receipt of the Clerk of the Tribal Court's statement(s).

(e) The Clerk of the Court of Appeals shall serve a Notice of Transmission of the Record on the parties' counsel.

6. The form and filing times for the parties' appellate briefs shall be as follows:

(a) Appellant's principal brief on appeal shall be filed within thirty (30) calendar days following the date of the notice of transmission of the record;

(b) Appellees' response brief shall be filed within twenty-five (25) days after receipt of appellant's brief;

(c) Appellant shall be permitted to file a reply brief within ten (10) days after receipt of appellees' brief;

(d) The form of the parties' briefs should conform generally to Ninth Circuit Rules 28-1 and 28-2 as

applicable, except that the maximum length shall be seventy (70) pages for the parties' principal briefs and twenty-five (25) pages for the reply, and references to the record shall be made to page numbers of the Excerpts of the Record; and

(e) The parties shall file with their briefs paginated "Excerpts of the Record" in conformance with Ninth Circuit Rule 30-1, except that the number of copies filed shall be the same as the number of briefs specified in Crow R. App. P. 9(a).

7. The Court will schedule oral argument by further order.

8. All motions for extension of time must be supported by a sworn affidavit and state opposing counsel's position regarding the extension.

DATED this 17th day of June, 1997.

s/ Victoria White
Victoria White, Chief Judge
Crow Court of Appeals

s/ Glen Birdinground
Glen Birdinground, Judge
Crow Court of Appeals

s/ William C. Watt
William C. Watt, Judge
Crow Court of Appeals

APPENDIX B — OPINION AND ORDER OF THE CROW COURT OF APPEALS FOR THE CROW INDIAN RESERVATION, CROW AGENCY, MONTANA DATED JUNE 17, 1997

IN THE CROW COURT OF APPEALS
IN AND FOR THE CROW INDIAN RESERVATION
CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 97-010

ESTATES OF RED WOLF and BULL TAIL,

Plaintiffs-Appellees,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Defendant-Appellant.

OPINION AND ORDER ON SURETY BOND

Defendant-Appellant Burlington Northern Railroad Company[1] has moved the court for a stay of execution on the judgment in this case, without a requirement that it post bond or any other form of security. According to the railroad, the motion is conditional, because it need not be addressed until the U.S. District Court's injunction barring enforcement of the judgment is vacated. *See Burlington Northern Railroad Co. v. Estate of Red Wolf, et al.*, 106 F.3d 868 (9th Cir. 1997), *petition for cert. filed* (U.S. May 16, 1997) (No. 96-1853).

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1. As a result of a merger effective December 31, 1996, the defendant corporation's name is now Burlington Northern and Santa Fe Railway Company. Crosby Aff. ¶ 2.

Appendix B

In light of the Ninth Circuit's decision cited above, Plaintiffs-appellees object to any further stay of execution on the judgment without the railroad being required to post a surety bond. However, it is these judgment creditors' position that while a bond in the full amount of the judgment, plus interest, must be posted immediately, they do not object to barring any execution on the bond until the railroad exhausts its federal review rights. We agree with the plaintiffs-appellees' position as being reasonable and compelled by Tribal law.

The judgment appealed from in this case was originally entered on February 6, 1996, in the aggregate amount of $250 million. The railroad requested the Tribal Court to waive the requirement in Rule 18(b) of the Crow Rules of Civil Procedure for posting a surety bond as a condition of a stay pending appeal. The Tribal Court denied the stay on February 9, 1996, and scheduled a hearing for approval of the surety bond.

The railroad immediately appealed the denial of the stay to this court, and without waiting for this court's decision or the Tribal Court' hearing, it obtained a restraining order and later a preliminary injunction from the U.S. District Court against the plaintiffs and the Honorable Tribal Court Judge. *Burlington Northern Railroad Company v. Estate of Red Wolf*, Cause No. CV 96-17-BLG-JDS (TRO dated Feb. 15, 1996). A divided panel of the U.S. Court of Appeals for the Ninth Circuit reversed and remanded on January 29, 1997, directing that the injunction be dissolved and the Federal court case stayed or dismissed pending the railroad's exhaustion of its remedies in the Tribal courts. *Red Wolf, supra*, 106 F.3d at 871. After the usual post-decisional motions were denied, the railroad filed a petition for writ of certiorari on May 16, 1997, which remains pending.

Appendix B

Meanwhile, twelve days after the Tribal Court denied the stay, a single judge of this court issued an expedited opinion and order denying the appeal as premature, but providing guidance to the Tribal Court on the requirements for the bond or other form of security under Crow R. Civ. P. 18(b). *Estates of Red Wolf and Bull Tail v. Burlington Northern Railroad Co.*, Civ. App. Docket No. 94-31 (Feb. 21, 1996). In that opinion, which the full panel adopts, the court held that (1) the requirement for fully securing the judgment is a mandatory requirement for the stay under the Tribal code, and (2) a substantial portion of the judgment must be secured by a surety bond, but (3) considering the magnitude of the judgment, some combination of other forms of security for the remainder would be within the Tribal Court's discretion. However, in further Tribal court proceedings relating to the bond, the railroad refused to post a bond of any kind, or to propose any other alternative forms of security.

This court again assumed jurisdiction of this case after the Tribal Court denied the railroad's post-trial motions on December 30, 1996. On January 28, 1997, the plaintiffs filed a "Notice and Request" for voluntary reducing the judgment to a total of $25 million, or $5 million per heir. In that Notice, the plaintiffs also requested that the railroad be required to post a $30 million bond to guarantee payment of the amended judgment plus interest, and with the "additional condition that any payment thereon shall not be required until the [railroad] receives whatever federal review it properly seeks and is entitled to." Notice and Request at 4.

This court on February 6, 1997, issued an Order Governing Conduct of Appeal which, among other things, indicated the court's intention to remand to the Tribal Court for the limited

purpose of amending the judgment to the reduced amount, and requested the parties to brief certain procedural issues. The parties did not object to the limited remand for amending the judgment, and a separate remand order is being issued concurrently with this opinion and order. All further references to the judgment in this opinion are to the amended judgment which we have directed the Tribal Court to enter.

This court's February 6 order also assumed jurisdiction over the surety bond issue. The order stayed further proceedings to enforce the judgment until the railroad exhausted or waived its rights to Federal court review of the requirement to post bond with the Tribal Court. We reconsider that order, along with the railroad's request for a further stay without the requirement to post bond, in light of the parties' procedural briefs.

There is a certain facial attractiveness to the prudential concept of staying Tribal court enforcement proceedings until the judgment debtor has exhausted its Federal court remedies without posting a bond. It may be argued on grounds of comity and sound judicial administration that it doesn't make sense to require a bond to be posted while there is any chance that the Supreme Court will grant the certiorari petition and reinstate the district court's injunction.[2] However, deferring to the Federal courts in these circumstances only leads us in a circle, because they, in turn, have been directed to stay their hands as a matter of comity until Tribal court remedies are exhausted. Thus, in light of the Ninth Circuit's clear directive to dissolve the Federal court injunction, we must vacate paragraph 2 of this court's February 6th order, and turn to the railroad's arguments in support of a continuing stay without bond.

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2. We consider this possibility without presuming that this case, in its current procedural posture, merits the attention of Supreme Court of the United States.

Appendix B

We start with the express requirement of Tribal law, as discussed and upheld in this court's opinion of February 21, 1996, that posting security for the full amount of the judgment is mandatory under the language of Crow R. Civ. P. 18(b). We examine the railroad's arguments to determine if some overriding emergency or inequity would result from requiring the railroad to post a $30 million bond.

First, the railroad points out that there can be no question of its ability to satisfy the reduced judgment. In lieu of any security, the railroad offers to provide quarterly SEC filings periodically to the parties and the court. BN Brief at 5. Although its assets on the Reservation are not sufficient to satisfy the judgment, the railroad is not the type of entity that can conceal its extensive physical assets located throughout the United States. *Id.* This is consistent with the railroad's openly avowed strategy of forcing the plaintiffs to execute against off-reservation assets (which would not be necessary once a bond were posted with the Tribal Court). BN Brief at 8.

The railroad thus frames the question as whether it must sacrifice its assets by posting bond in order to preserve its review rights beyond this court. *Id.* It is apparent that the import of the railroad's request is to allow it to use special proceedings to enforce the equivalent of a foreign-country judgment as a device for obtaining review of Tribal Court due process in various *state* courts in other jurisdictions where the railroad's off-reservation assets are located. *See* BN Brief at 8-9 and notes 7 and 8.

We cannot create an exception to express statutory law in order to accommodate this strategy of attrition. We are confident that whatever extra-Tribal remedies the railroad may have after

this court completes its review will be appropriately protected by the Federal courts. *See, e.g., Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997). Conditioned as proposed by the plaintiffs, the bond would accommodate whatever federal review rights are determined to exist so that the railroad's property will be fully protected until it has had the opportunity to seek review of the judgment by the highest court in the land. That seems fair enough to us.

Next, the railroad argues that it is unjust to require it to post bond considering the excessive size of the judgment together with the serious questions it will raise regarding the conduct of the trial, and the plaintiffs' apparent inability to reimburse the cost if the railroad prevails on appeal. We have thrice previously declined to review the Tribal Court proceedings in this case on a piecemeal basis, and we decline again here to review the merits of the judgment in this ancillary proceeding. It is sufficient at this point to observe that the railroad's authorities regarding compensatory damages for non-economic losses are not controlling, and a multi-million dollar verdict in a wrongful death action has not been held by this court to be unconscionable *per se*.

Finally, the railroad argues that if a bond is required and it refuses to post the bond, its 50 miles of mainline track and critical unit-train coal traffic will be disrupted. This will result in extra cost to its customers, power blackouts in the Midwest, and the eventual crippling of America's industrial economy. BN Brief at 6; Robb Affidavit ¶¶ 3-4 (Exh. 4 to Motion for Stay). While some of those injuries may be irreparable, they are certainly and completely avoidable by the railroad simply posting the bond. As discussed above, this requirement cannot be held to be inequitable, when execution on the bond is conditioned upon exhaustion of Federal court review rights.

Appendix B

The issue of whether execution on the railroad's Reservation assets is pre-empted by federal law is not before us at this time. Expiration of the stay for failure to post bond would not necessarily result in execution against Reservation trackage (or necessarily limit execution on the judgment to those assets). Unless and until that series of eventualities must be dealt with in due course, this court will turn its attention to deciding the merits of the appeal. Toward that end, the court has settled questions on the composition of the record on appeal and established a briefing schedule in a separate order.

For the reasons stated above,

IT IS HEREBY ORDERED that:

1. Burlington Northern's conditional motion for stay of execution of the judgment without posting bond is DENIED;

2. This court's order in paragraph 2 of its Order Governing Conduct of Appeal dated February 6, 1997 (which stayed enforcement proceedings pending exhaustion of Burlington Northern's federal review rights) is VACATED;

3. Consistent with Crow R. Civ. P. 18(a), proceedings for enforcement of the judgment are STAYED until ten (10) days after entry of the Tribal Court's amended judgment on the limited remand; and

4. A further stay of proceedings to enforce the judgment shall be granted by the Tribal Court if appellant posts an acceptable surety bond with the Tribal Court in the aggregate amount of $30 million *before* the expiration of the stay ordered in paragraph 3 above, with the protective condition on the bond

that it will not be executed upon until Burlington Northern receives whatever Federal court review of the judgment to which it is entitled. Any deviation from the foregoing language as a condition on the bond shall be entertained by the Tribal Court only upon the stipulation of the parties.

DATED this 17th day of June, 1997.

s/ Victoria White
Victoria White, Chief Judge
Crow Court of Appeals

s/ Glen Birdinground
Glen Birdinground, Judge
Crow Court of Appeals

s/ William C. Watt
William C. Watt, Judge
Crow Court of Appeals

Supreme Court, U.S.
FILED
JUN 25 1997
CLERK

No. 96-1853

In The

Supreme Court of the United States

October Term, 1996

BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

vs.

ESTATES OF RED WOLF AND BULL TAIL, VALERIE RED WOLF, GLADYS RED WOLF, RANDY RED WOLF, DORRIE BULL TAIL, DEWEY BULL TAIL, AND RON ARNESON, CROW TRIBAL COURT SPECIAL JUDGE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ESTATES OF RED WOLF AND BULL TAIL

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LIST OF INTERESTED PARTIES

The Petitioner is Burlington Northern Railroad Company.

The Respondents are correctly identified in the caption.

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OPINIONS BELOW

The Ninth Circuit Court of Appeals determined that the District Court erred in exercising its jurisdiction because Petitioner BN had not exhausted its Tribal Court remedies. BN sought a petition for rehearing *en banc* and no judge of the Ninth Circuit Court of Appeals requested a vote on the suggestion for rehearing *en banc*. This decision is reported at 106 F.3d 868. Pet. App. 1a-15a. Respondents Estates of Red Wolf and Bull Tail, Valerie Red Wolf, Gladys Red Wolf, Randy Red Wolf, Dorrie Bull Tail, and Dewey Bull Tail shall be referred to herein as "Red Wolf".

STATEMENT OF JURISDICTION

Petitioner (BN) seeks to invoke the jurisdiction of this Court through 28 U.S.C. § 1254(1) and Rule 10 of the Supreme Court Rules.[1] Rule 10 provides that a petition for a writ of *certiorari* will be granted only for special and important reasons. The rule then recites the reasons. Here, the Ninth Circuit Court of Appeals has *not* rendered a decision in conflict with the decision of any other United States Court of Appeals on the same matter nor has it in any way "departed from the accepted and usual course of judicial proceedings" but, on the contrary, has prevented the Federal District Court from doing so. Furthermore, the Ninth Circuit has not decided a question of federal law which has not been but should be settled by this Court but, on the contrary, has dutifully followed the mandate of this Court regarding the exhaustion of tribal court remedies. Under the circumstances, BN's petition does not fall within the ambit of Rule 10 of the Supreme Court Rules.

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1. BN was required by Rule 14.1(g)(ii) to state the basis for federal jurisdiction in the Federal District Court. BN has failed to do so. There was no jurisdiction properly exercised by the Federal District Court because BN failed to exhaust its Crow Tribal Court remedies.

INTRODUCTION

BN has petitioned this Court for a writ of *certiorari* claiming there is a conflict in the Circuits as to the appropriate application of the Tribal Court exhaustion doctrine set forth in *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987). There is *no* conflict in the Circuits on this issue and hence, no basis for a writ of *certiorari*.

The BN also seeks a grant, vacate, and remand order (GVR) on the basis of this Court's recent decision in *Strate v. A-1 Contractors*, __ U.S. __, 117 S. Ct. 1404 (1997). This case is factually distinguishable from *A-1 Contractors* and there is no need for GVR in this case. *A-1 Contractors* involved no tribal members, whereas this case involves two deceased tribal members and the railroad, a non-tribal member. The accident in *A-1 Contractors* took place on non-Indian land, that is, on a state highway right-of-way, open to the public, from which the Indian Tribe had totally divested itself of title to the land. In this case, the Crow Tribe owns the title to the land comprising the railroad right-of-way where the accident occurred.

A-1 Contractors is a jurisdiction case, not a "failure to exhaust tribal remedies" case. The Ninth Circuit decision was based on BN's failure to exhaust tribal remedies and BN's request for a GVR on the basis of *A-1 Contractors* is inappropriate.

STATEMENT OF THE FACTS

BN has set forth its "Statement of the Case" on pages 1 through 14 of its petition. Most, if not all, of BN's statement is self-serving argument, as compared to fact, and designed to convince this Court to grant a writ under inappropriate

circumstances. The correct statement of the facts is contained in the Ninth Circuit's opinion. (Pet. App. pp. 1a-9a). These verbatim facts are as follows:

> A jury in Crow Tribal Court awarded $250 million to the heirs of two tribal members killed when a Burlington Northern Railroad train hit their car at a railroad crossing on the reservation. Under the Crow Tribal Code, execution on the judgment was automatically stayed for ten business days. The Railroad moved to stay the judgment and to waive the Code's supersedeas bond requirement pending its appeal to the Crow Court of Appeals. The trial court denied the motion and ordered the Railroad to post bond in the amount of the judgment plus interest as required by Rule 18 of the Crow Tribal Court. The Railroad appealed that bond ruling. *Before* the tribal appellate court ruled on that question, the Railroad sought and received a temporary restraining order in federal court enjoining enforcement of the tribal court judgment.
>
> The tribal trial court held a previously scheduled hearing regarding posting of a supersedeas bond, but the Railroad refused to post such a bond and presented no alternatives to secure the judgment. The trial court held that without the Railroad's participation it could not modify its previous order. The Tribal Court of Appeals declined to review the trial court's bond order until after that court entered final orders

concerning the specific security required as a condition of staying the judgment. It provided guidelines for the trial court's determination of the appropriate bond or other security required and directed that court to stay all proceedings to execute on the judgment and any requirement for security during the pendency of any restraining orders issued by the district court. It further instructed the trial court to proceed to determine the appropriate form of security to be implemented *when all federal restraining orders were lifted.*

Meanwhile, the district court granted the Railroad's motion for a preliminary injunction against execution or enforcement of the tribal court judgment. The injunction was intended to "maintain [] the status quo and preserv[e] the court's jurisdiction should future federal litigation occur in this matter."

* * *

The railroad argues that the tribal courts had an adequate opportunity to decide whether or not it must post a supersedeas bond. Its motion for a stay from posting a bond in tribal court was considered by both the tribal court and the tribal appellate court. *It concedes, however, that there was no final ruling on the form and amount of security that would suffice to stay the judgment.*

The district court acknowledged that

> *tribal remedies had not been exhausted*, but nevertheless exercised its injunctive power to maintain the status quo and to preserve its jurisdiction. . . .
>
> *The Railroad does not argue that a National Farmers exception applies.* But it does argue that further tribal court proceedings to determine the amount of a bond or the nature of other security would be futile because it could not risk posting a bond or other security in tribal court. . . .
>
> The Railroad's "futility" argument cannot be construed as an exception to the exhaustion requirement. The *National Farmers* futility exception applies where exhaustion would be futile because of lack of adequate opportunity to challenge the court's jurisdiction. *National Farmers*, 471 U.S. at 856 n.21. *The judgment creditors here agreed to condition the supersedeas bond upon completion of all available federal review.* Regardless of the extent of review available, it may not be said that there is inadequate opportunity to challenge the court's jurisdiction when, as here, federal review of tribal court jurisdiction is assured.

(Pet. App. pp. 5a, 6a, 7a, 8a) (emphasis added).

BN's and the Federal District Court's interference with the tribal court procedure concerning the supersedeas bond, did not maintain "the status quo". The District Court's action stripped the Tribal Trial and Appellate Courts of any authority to proceed with the supersedeas bond issue.

The District Court interjected itself into the Tribal Court process, before BN had even begun to exhaust its Tribal Court remedies. The District Court was presented with a vast number of BN contentions regarding BN's claim of "unfairness". The District Court, based on BN's allegations, made a finding on the "probable success on the merits", on "the possibility of irreparable injury" and on "the balance of hardships". (Pet. App. p. 20a). These are the very issues being raised by BN in the Tribal Court proceedings, which proceedings were "stopped cold" by the District Court's order. In its February 21, 1996 order, the Crow Court of Appeals fully understanding the concept of "comity", abstained, stating:

> Based on principles of comity, the Tribal [trial] Court should stay all proceedings to actually execute on the judgment and any requirement for actually posting security during the pendency of any restraining orders issued by the U.S. District Court.

(Red Wolf App. pp. 22a-23a). The United States Supreme Court mandates that the Federal District Court abstain, *not that the Tribal Court abstain.*

REASONS FOR DENYING THE WRIT

I.

NO CONFLICT EXISTS AMONG THE CIRCUIT COURTS ON THE TRIBAL COURT EXHAUSTION DOCTRINE.

The law on exhaustion of tribal court remedies was determined by this Court in *National Farmers Union Insurance Co. v. Crow Tribe* and *Iowa Mutual Insurance Co. v. LaPlante.* In *National Farmers Union*, this Court stated:

> [U]ntil petitioners have exhausted the remedies available to them in the Tribal Court system, n 4, supra, it would be premature for a federal court to consider any relief.

Id. at 857.

In *Iowa Mutual*, this Court clarified its position in *National Farmers* stating:

> We concluded that, . . . *considerations of comity direct that tribal remedies be exhausted before the question is addressed by the District Court. . . .*
>
> *. . . Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a "full opportunity to determine its own jurisdiction." . . . Adjudication of such matters by any nontribal court also infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law.*
>
> *As National Farmers Union indicates, proper respect for tribal legal institutions requires that they be given a "full opportunity" to consider the issues before them and "to rectify any errors."* 471 U.S. at 857, 85 L. Ed. 2d 818, 105 S. Ct. 2447. . . . *In this case, the Tribal Court has made an initial determination that it has jurisdiction over the insurance dispute, but* ***Iowa Mutual***

> *has not yet obtained appellate review, as provided by the Tribal Code, ch 1, § 5. Until appellate review is complete, the Blackfeet Tribal Courts have not had a full opportunity to evaluate the claim and federal courts should not intervene.*
>
> * * *
>
> Although petitioner must exhaust available tribal remedies before instituting suit in federal court, the Blackfeet Tribal Courts' determination of tribal jurisdiction is ultimately subject to review.

Id. at 14-19 (emphasis added).

The exhaustion of the tribal court remedies rule has been applied uniformly throughout the United States by the Circuit Courts. BN claims that a conflict exists because of the Seventh Circuit decision in *Altheimer and Gray v. Sioux MFG, Corp.*, 983 F.2d 803, 814-815 (1993). In *Altheimer and Gray*, the Indian manufacturing company "explicitly agreed" to submit to the venue and jurisdiction of federal and state courts located in Illinois for the purpose of construing state contract law. The Seventh Circuit found, in light of this agreement:

> To refuse enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination. The Tribe created SMC to enhance employment opportunities on the reservation. As the Ninth Circuit recognized, economic independence is the foundation of a tribe's self-determination. If contracting parties cannot

> trust the validity of choice of law and venue provisions, SMC may well find itself unable to compete and the Tribe's efforts to improve the reservation's economy may come to naught. We therefore affirm the district court's denial of SMC's motion for a stay of proceedings based on the tribal exhaustion rule.

Id. at 815. *Altheimer and Gray* creates no conflict but merely emphasizes the exhaustion doctrine.

This Court in *National Farmers* and *LaPlante* determined that exhaustion of tribal court remedies was mandatory. However, this Court set forth certain exceptions:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," cf. Juidice v. Vail, 430 US 327, 338, 51 L. Ed. 2d 376, 97 S. Ct. 1211 (1977), or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, n. 21 (1985).

As the Ninth Circuit stated, below: "The Railroad does not argue that a *National Farmers* exception applies." (Pet. App. p. 8a). BN obviously cannot argue, for the first time on a petition for writ of *certiorari*, that a *National Farmers* exception applies.

Adikes v. Kress & Co., 398 U.S. 144, 147 n. 2 (1970). BN did not previously argue "harassment", "bad faith", or that Red Wolf's death claims were "patently violative of express jurisdictional prohibitions". BN meekly argued to the Ninth Circuit that it would be futile to post a bond because it would not have an opportunity to challenge the Tribal Court's jurisdiction. In rejecting this argument, the Ninth Circuit stated:

> The Railroad's "futility" argument cannot be construed as an exception to the exhaustion requirement. The *National Farmers* futility exception applies where exhaustion would be futile because of lack of adequate opportunity to challenge the court's jurisdiction. *National Farmers*, 471 U.S. at 856 n. 21. The judgment creditors here agreed to condition the supersedeas bond upon completion of all available federal review. Regardless of the extent of review available, it may not be said that there is inadequate opportunity to challenge the court's jurisdiction when, as here, federal review of tribal court jurisdiction is assured.

(Pet. App. pp. 8a-9a). BN has no futility argument.

There simply is no conflict among the Circuits on this issue. BN has made no serious effort to support its claim that such a conflict exists. A writ of *certiorari* would certainly be inappropriate on the basis that a conflict in this area of the law exists.

II.

GVR IS INAPPROPRIATE ON THE BASIS OF *A-1 CONTRACTORS*.

BN has asked this Court to grant, vacate, and remand, claiming the Ninth Circuit decision conflicts with *A-1 Contractors*. Such statement is inaccurate. *A-1 Contractors* is a jurisdiction case, not a "failure to exhaust tribal remedies" case.

BN's comparison of the two cases is inaccurate. In *A-1 Contractors*, neither of the parties were tribal members. In the case at bar, two of the deceased parties were tribal members and the other party was a railroad, a non-tribal member. In *A-1 Contractors*, the accident occurred on a part of the state's highway where the right-of-way was *open to the public*. The tribe, in granting the land for the state highway in *A-1 Contractors*, "expressly reserved no right to exercise dominion or control over the right-of-way". 117 S. Ct. 1404, 1414. In the case at bar, the accident giving rise to Red Wolf's claims occurred on land to which the Crow Indian Tribe holds title. The accident, in other words, did not occur on alienated non-Indian land, but on land owned by the Tribe.

In *United States v. Soldana*, 246 U.S. 430 (1918), this Court specifically held that the Crow Tribe holds title to the land encompassing BN's right-of-way where the subject accident occurred.[2] The issue before this Court was whether the Indian title to the soil on which the station platform stood had been

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2. The CB&Q acquired the original right-of-way through the Crow Reservation from the Big Horn Southern Railroad under Act of March 1, 1893, Chap. 192 (27 Stat. at L. 529). In 1970, the CB&Q merged with other railroads to create the Burlington Northern Railroad Company which thereafter maintained and operated the right-of-way. *See United States v. ICC*, 396 U.S. 491 (1970).

extinguished by Congress' grant of the right-of-way or whether the railroad merely had a right-of-way or other limited interest in the land on which to construct and operate a railroad. The Court analyzed and construed the acts of Congress granting the right-of-way to the railroad, and concluded "it is clear that it was not the purpose of Congress to extinguish the title of the Indians in the land comprised within the right-of-way". *Id.* at 532-33.[3]

BN has represented to this Court that the Crow Tribe does not own the land within the railroad right-of-way. *Soldana* renders this statement untrue. The same conclusion was reached by the Montana Supreme Court in *Burlington Northern RR Co. v. Montana Dept. of Public Service Regulation*, 720 P.2d 267 (Mont. 1986). BN has known of these rulings, has not brought them to the attention of this Court, but still inexplicably argues to this Court that the railroad right-of-way, owned by the Tribe, must be treated exactly as the highway right-of-way in *A-1 Contractors*, not owned by the Tribe.

The railroad right-of-way at issue in *Soldana* and in *BNRR Co. v. Montana Dept. of Public Service Regulation*, is the *same* right-of-way on which the subject accident occurred. Under these circumstances, and given this Court's ruling in *Montana v. United States*, 450 U.S. 544 (1981), that *tribes retain civil jurisdiction over non-member conduct on tribal lands*, it is "plain" that the Tribal Court does have jurisdiction in this case.[4]

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3. The acts of Congress construed and interpreted by the Court were the same acts relied upon by BN in this case for the proposition that the Crow Tribe does not hold title to the land underlying the right-of-way. *See* Pet. App. p. 43a; Pet. Br., pp. 16-17.

4. The presumption in favor of Tribal Court jurisdiction over non-member conduct *on tribal lands* articulated in *Montana* makes it unnecessary to discuss the two *Montana* "exceptions" which apply only in the face of *Montana*'s "main rule" governing non-tribal lands, not applicable here.

Even if there is an exception to the exhaustion rule for highway right-of-way cases where Tribal Court jurisdiction is "plainly" absent, this is "plainly" not such a case. The Ninth Circuit properly applied the Tribal Court exhaustion doctrine required by this Court in *National Farmers Union* and *LaPlante*, and such application does not conflict with *A-1 Contractors*.

In *A-1 Contractors*, this Court stated: "We express no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation." 117 S. Ct. 1404, 1408. Not only did the subject accident occur on the BN right-of-way which was owned by the Crow Tribe and susceptible to taxation by the Crow Tribe [*BN v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991)], the accident also occurred on an intersecting road on the reservation. Since the record does not disclose whether the road was a tribal road, a county road, or a private road, it will be up to the Crow Court of Appeals to make such a determination in the first instance.

In *A-1 Contractors*, the road was undeniably owned by the state, and the tribe had given up all dominion and control. Under these circumstances, it can hardly be said that the Tribal Court "plainly" has no jurisdiction in this case. There simply is no comparison to be drawn between the case at bar and *Strate v. A-1 Contractors*.

A-1 Contractors did not change the mandatory nature of the exhaustion rule, nor did it change the exceptions. Indeed, exhaustion was not even an issue in the case.[5] The Court's discussion of the exhaustion requirement in *A-1 Contractors* was not a reformulation of the doctrine but merely a reiteration that

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5. The Federal Court action in *A-1 Contractors* was not filed until after both the Tribal Trial Court and the Northern Plains Intertribal Court of Appeals had finally ruled on the issue of tribal court subject-matter jurisdiction. *See A-1 Contractors v. Strate, supra*, p. 3.

National Farmers and *LaPlante* are exhaustion cases and not jurisdictional cases.

This Court in *A-1 Contractors* confirmed that both *National Farmers* and *LaPlante* "describe an exhaustion rule allowing tribal courts initially to respond to an invocation of their jurisdiction". When the Court commented, in footnote 7, that exhaustion is not an "unyielding requirement", it was specifically referring to the exceptions of "harassment", "bad faith", "futility", and actions "patently violative of express jurisdictional prohibitions", established in *National Farmers*. The Court did not add to those exceptions and did not in any way dispense with the abstention rule of tribal court exhaustion.

Finally, the Congressional Act, 25 Stat. 660, which created this right-of-way, placed a specific duty on BN to conduct its railroad operations "with due regard to the rights of the Indians". (Pet. App. pp. 44a). Where the right-of-way statute created the duty of care on the part of the BN toward the Crow tribal members, BN's claim that there is no connection between the operation of the train and the Crow tribal members is nonsensical. Of course, no such duty of care was created by the right-of-way grant in *A-1 Contractors*.

In *South Dakota v. Bourland*, 508 U.S. __, 124 L. Ed. 2d 606, 113 S. Ct. 2309 (1993), *Montana v. United States*, 450 U.S. 544 (1981); *Brendale v. Confederated Yakima Nation*, 492 U.S. 408 (1989) and *Strate v. A-1 Contractors, supra*, the Indian Tribes had conveyed title to the land to third parties, or, as in *Montana*, never held title to the bed of the Big Horn River. Furthermore, the lands in those cases, title of which was not held by the Tribes, was open to the public. In the case at bar, the Crow Tribe has maintained, at all times, the title to the land encompassing the right-of-way. In *Soldana*, this Court said:

> To have excepted this strip from the reservation would have divided it into two; and would have rendered it much more difficult, if not impossible, to afford that protection to the Indians which the provisions quoted were designed to insure.

Id. at 533.

In *Strate v. A-1 Contractors*, this Court held: "We 'can readily agree,' in accord with *Montana*, 450 U.S. at 557, that tribes retain considerable control over nonmember conduct *on tribal land*." 117 S. Ct. 1413 (emphasis added). Since the Crow Tribe owned the land in the case at bar, BN's reliance on this Court's decisions dealing "with land alienated to non-Indians" is inapposite and non-controlling. The Crow Tribal Court had jurisdiction over the conduct of BN on the land owned by the Tribe.

If, somehow, the Crow Court of Appeals or a Federal Court were to rule that this accident occurred on a BN right-of-way which was the equivalent of "alienated, non-Indian land", in disregard of the Crows' ownership, the Crows' ability to tax, the facts concerning the character and ownership of the intersecting road, and the Congressional Act requiring BN to operate its railroad with due regard to the rights of the Crow Indians, the *Montana* exceptions would nevertheless create jurisdiction in the Crow Tribal Court.

The first Montana exception covers "activities of non-members who enter consensual relationships with the tribes or its members through commercial dealings, contracts, leases, or other arrangements." Here, the Congressional grant of the right-of-way to BN across Crow land, reserving title to the land within the right-of-way to the Crow Tribe, specifically created a duty

of safety so as not to harm or kill Crows. If BN and its predecessors refused to give such due regard to the rights of the Indians, which sadly has been the case over the years, the Crow Indians obviously have jurisdiction to fashion a remedy.

Furthermore, the statute provided that "the President of the United States may, in his discretion, require that the consent of the Indians to said right of way shall be obtained by said railroad company, in such manner as he may prescribe, before any right under this act shall accrue to said company." (Pet. App. p. 44a.) Even if the Congressional statute were not at least a "consensual relationship" with the Crow Tribe, the railroads entered into a specific written agreement with the Crow Tribe before the right-of-way was ever granted by Congress. A copy of this written agreement is included in the record before the Crow Court, but is not before this Court.

The dispute in this case, arising out of this federal statute granting the right-of-way, is distinctly tribal in nature, as compared to "non-tribal in nature" as found in *A-1 Contractors*. Red Wolf's decedents were members of the Tribe. Over the last ten years preceding the deaths of Red Wolf's decedents, as many as 25 other members of the Crow Tribe were killed by BN on the reservation. This situation can hardly be characterized as a "run-of-the-mill" [highway] accident. 117 S. Ct. 1415. Under these circumstances, the Crow Tribal Court of Appeals certainly has the obligation and the right to determine whether the *Montana* exception of "consensual relationships" creates subject matter jurisdiction for the Crow Tribal Court.

The facts in this case also meet the second exception to the *Montana* general rule because BN's conduct over the last decade, whereby it has caused the death of at least 25 tribal members, where BN failed to operate its railroad operations with due regard for the rights of Crow Indians, has threatened the "health or

welfare of the Tribe". The very reason voir dire was cumbersome in the Crow Tribal Trial Court was that so many Crow tribal members had been killed by BN in recent years. Many prospective jurors agreed they could not be fair because of the death of a loved tribal member and hence did not sit. The number of deaths was simply overwhelming.

Where: (1) the Tribe owned the land; (2) the Tribe had the right to tax BN's railroad operation; (3) BN had the congressionally mandated duty to give due regard to the rights of tribal members; and (4) BN had killed 25 tribal members in recent years by breaching the congressional statute, it is difficult to imagine a greater threat to the health and welfare of the Crow Tribe than the conduct of BN. Not only did the actions of BN directly affect the health and welfare of the Tribe, but the political integrity and economic security of the Tribe and its members as well.

BN argues that there can be no jurisdiction in the Tribal Court for a civil tort remedy in the event of personal injury or death on a reservation where the alleged tort feasor is a non-Indian. This Court has never so ruled and certainly did not so rule in *A-1 Contractors*. BN, in its petition for writ of *certiorari*, is asking this Court to make a disastrously wide-sweeping change in the area of tort litigation in Tribal Courts, with an incomplete record, *before* the Crow Tribal Court of Appeals has had an opportunity to rule.

BN asks this Court to grant its petition for writ of *certiorari* when the Ninth Circuit specifically found that BN failed to exhaust its Tribal Court remedies and when the Federal District Court acknowledged BN had not so exhausted those remedies. (Pet. App. pp. 5a, 6a, 7a). BN's position is that this Court should overrule its decisions in *National Farmers Union Insurance Co. v. Crow Tribe*, and *Iowa Mutual Insurance Co. v. LaPlante*, where

this Court repeatedly held that the Tribal Court must have the first opportunity to determine jurisdiction which will, in turn, allow a full record to be developed in the Tribal Court so that appropriate federal review can follow. In order to accomplish these goals, it is mandatory that the Federal Court "stay its hand" to give the Tribal Court the opportunity to determine the existence of jurisdiction.

The Ninth Circuit panel, when BN sought an *en banc* rehearing, and after no judge of the Ninth Circuit even requested a vote on the suggestion for rehearing *en banc*, relied on *National Farmers* and *LaPlante*, determined that exhaustion of tribal court remedies was mandatory, and ordered that the permanent injunction issued by the Federal District Court be dissolved and that the Federal District Court abstain. The Ninth Circuit was correct in its ruling.

Tribal jurisdiction over the subject railroad deaths was not changed by the *A-1 Contractors* case. At the very least, the tribal court jurisdiction question needs to be determined by the Crow Court of Appeals in the first instance, in light of *A-1 Contractors*, before any Federal Court involvement. The Crow Court of Appeals has ordered the parties in their appellate briefs to address *Strate v. A-1 Contractors* on the issue of subject matter jurisdiction. The Crow Appellate Court also stated: "The parties may supplement the record with copies of such public records as they believe are relevant to the jurisdictional inquiry, including but not limited to treaties, statutes, Tribal ordinances, and right-of-way documents." The Crow Court of Appeals is obviously in the process of making a determination of Tribal Court jurisdiction at this time. (Red Wolf App. p. 33a).

The Ninth Circuit's decision was correct and BN's petition for *certiorari* should be denied. Furthermore, it would be highly inappropriate for this Court to enter a GVR order in light of the

BN's failure to exhaust tribal remedies and the abstention doctrine mandating the Federal Court to "stay its hand".

III.

BN'S PETITION CREATES THE "PROCEDURAL NIGHTMARE" ENVISIONED BY THIS COURT IN *NATIONAL FARMERS*.

BN's petitioning this Court for a writ of *certiorari* asking this Court to determine there is no Tribal Court jurisdiction in this case, when this precise issue is pending before the Crow Court of Appeals, creates a serious problem. A lengthy record exists in the Crow Tribal Court system, which record *is not and was not* before the Federal District Court, the Ninth Circuit, or this Court. It would be all but impossible for the Federal District Court, the Ninth Circuit, or this Court to rule on the jurisdictional issue without the benefit of this entire record.

Query: Does the Crow Tribe tax BN for the right-of-way? Query: Is the road which intersects the railroad right-of-way where the accident occurred a tribal road, a county road or a private road? Query: What was, or, better stated, what will be, the basis for the Crow Tribal Court of Appeals determining the existence of or denying the existence of subject matter jurisdiction?

On page 16 of its petition, BN states: "After the decision in *A-1 Contractors*, the lack of tribal court jurisdiction over the *Red Wolf* case could not be clearer." Therefore, BN asks this Court [or a lower Federal Court pursuant to a GVR order] to determine whether or not Tribal Court subject matter jurisdiction exists, after the Crow Tribal Trial Court has determined jurisdiction does exist, *but before* the Crow Tribal Court of Appeals has had an opportunity to rule on the issue. It is difficult

to envision a greater violation of the mandatory exhaustion rule of *National Farmers* and *LaPlante*, or more interference with the Tribal Court's judicial system, than is being urged by BN.

BN has attempted to attack the Crow Tribal Court because of the manner in which it handled the jury trial of *Red Wolf v. BN*, claiming its rights to due process and equal protection were violated. BN contends that the jurors were friends and relatives of Red Wolf. These very issues are discussed at length by BN in Red Wolf's brief to the Crow Tribal Court of Appeals. [This brief is *not* a part of the record in this case.] Red Wolf has already answered all the concerns raised by BN before the Crow Court of Appeals. Also, BN sued the Crow Tribal Court Judge, the Honorable Ronald Arneson, in Federal Court *before* the Tribal Court of Appeals had an opportunity to rule on the appeal issues. BN is asking this Court to grant a writ of *certiorari* when, to do so, would cause even more interference with the Crow Tribal Court system than has already been caused.

BN has further attacked the Crow Tribal Court, claiming that the Crow Judge, Donald Stewart, exhorted the jurors to take action against BN, speaking in the Crow language. BN has chosen to advise this Court of BN's slanted version of Judge Stewart's statement in Crow, *without advising this Court that the Crow Court of Appeals has already made a procedural ruling on how this Crow language interpretation will be handled on appeal.* In this regard, Judge William C. Watt of the Crow Court of Appeals, stated:

> Appellant's request to transmit the record has raised the question of whether the video and audio tapes of the trial are "transcripts" within the meaning of Rule 7, and if so, how they may be duplicated and cited on appeal. *The accuracy of any translations from the*

> *Crow language may also become an issue.* One purpose of this order is to establish a process at the outset of these proceedings for resolving any questions concerning the record on appeal.

(Red Wolf App. p. 2a) (emphasis added).

On page 19 of its petition, BN finds fault with the Crow Court of Appeals in not having already ruled on the issue of subject matter jurisdiction. BN's interference with the Crow Tribal Court jurisdiction has been so extreme that it has forced the *Crow Court of Appeals to abstain*. The Crow Court of Appeals stated: "Based on principals of comity, the trial court should stay all proceedings to actually execute on the judgment and any requirement for actually posting security during the pendency of any restraining orders issued by the U.S. District Court." Arneson ER, p.123. In light of this interference by BN with the Crow Tribal Courts, it is strained for BN to complain about any delay.

The BN's refusal to accept the Ninth Circuit's correct decision requiring exhaustion of tribal court remedies and BN's petition for a writ of *certiorari* have created the precise "procedural nightmare" envisioned by this Court in *National Farmers* which created the rule mandating exhaustion of tribal court remedies. The granting of BN's petition would simply cause further disruption of the tribal court remedies which the parties are currently attempting to exhaust. Under these circumstances, the granting of BN's petition for writ of *certiorari* would be inappropriate.

BN'S MISSTATEMENTS OF FACT AND LAW

BN has made serious misstatements of fact and law in its continuing interference with the Tribal Court process and in its attempt to have the Ninth Circuit opinion set aside. Rule 15 of the Supreme Court rules admonishes the parties to point out misstatements at an early juncture. Several of BN's misstatements have already been discussed above. Other misstatements made by BN are as follows:

BN claims it is facing a $250 million judgment when it knows, and the Ninth Circuit specifically noted, that the judgment will be reduced to $25 million, as will the bond, plus interest. The Crow Court of Appeals has remanded the case to the Crow Tribal Court for the very purpose of amending the judgment to $25 million and reducing the bond accordingly. (Red Wolf App. pp. 2a-3a and 30a-33a).

BN states it will be severely prejudiced by the Ninth Circuit's ruling that it must file the $25 million bond in accordance with the Tribal Court's order. Red Wolf, to avoid any prejudice, entered into a stipulation. The Ninth Circuit accepted that stipulation and said:

> The judgment creditors here agreed to condition the supersedeas bond upon completion of all available federal review. Regardless of the extent of review available, it may not be said that there is inadequate opportunity to challenge the Court's jurisdiction when, as here, *the federal review of Tribal Court jurisdiction is assured.*

(Pet. App. pp. 8a-9a) (emphasis added).

Finally, BN has misrepresented to this Court what it claims to be injustices it has suffered. Red Wolf has responded in the appropriate Tribal Court to each of BN's alleged claims. Of course, it would be inappropriate for Red Wolf to comment at this time on BN's claimed alleged errors, which are pending before the Tribal Court because the record before this Court is far from complete, whereas the record before the Tribal Court is complete.

CONCLUSION

BN's application for writ of *certiorari* should be denied. The Tribal Court exhaustion rule mandates abstention by the Federal Courts until such time as the Tribal Court has had an opportunity to, on a full record, make all the appropriate determinations. At that time, and at that time only, may the Federal Court become involved. This rule of abstention is mandatory unless the specific exceptions set forth in *National Farmers* are met. No such exception has been met in this case and abstention is mandatory.

Furthermore, the decision of this Court in *A-1 Contractors* is certainly not controlling in the case at bar, all as discussed above. The Crow Tribal Court of Appeals must make its determination as to whether or not subject matter jurisdiction exists based on all the controlling law, including this Court's recent decision in *A-1 Contractors*. Under no circumstances should the federal court system become involved in ruling on this jurisdictional issue when, on the basis of "comity", the Federal Courts must abstain until the Tribal Court has had a full opportunity to rule on the issues.

Respectfully submitted,

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APPENDIX A — ORDER GOVERNING CONDUCT OF APPEAL IN THE CROW COURT OF APPEALS, IN AND FOR THE CROW INDIAN RESERVATION, CROW AGENCY, MONTANA FILED FEBRUARY 7, 1997

IN THE CROW COURT OF APPEALS
IN AND FOR THE CROW INDIAN RESERVATION
CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 97-010

ESTATES OF RED WOLF and BULL TAIL,

Plaintiffs-Appellees,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Defendant-Appellant.

ORDER GOVERNING CONDUCT OF APPEAL

Burlington Northern Railroad Company ("BN") filed a notice of appeal on January 8, 1997, from the judgment of the Tribal Court entered against BN on February 6, 1996, in the total amount of $250 million. BN also appeals from all prior Tribal Court orders and rulings, and from the Tribal Court's order of December 30, 1996, denying BN's motion for judgment n.o.v. or for a new trial. For the reasons stated in this court's Order in Civ. App. Docket No. 94-31 filed April 24, 1996, BN's notice of appeal was timely filed.

A. *The Record on Appeal.* In furtherance of its duties under

Appendix A

Rule 8 of the Crow Rules of Appellate Procedure, BN has requested the Clerk's office to ensure that the record on appeal is timely transmitted to the Court of Appeals, and has offered such assistance as may be required.

Due to the size of the record is in this case, the Clerk's office has not been able to complete the assembly and duplication of the record within the time allowed by the Rule. Appellant's request to transmit the record has raised the question of whether the video and audio tapes of the trial are "transcripts" within the meaning of Rule 7, and if so, how they may be duplicated and cited on appeal. The accuracy of any translations from the Crow language may also become an issue. One purpose of this Order is to establish a process at the outset of these proceedings for resolving any questions concerning the record on appeal.

B. Plaintiffs' Notice and Request. On January 28, 1997, the plaintiffs, through their counsel, filed a "Notice and Request" with the Court of Appeals requesting us to enter an amended order reducing the total amount of the judgment to $25 million ($5 million per heir rather than $50 million).[1] Plaintiffs also requested this court to require a supersedeas bond in the amount of $30 million, including post-judgment interest, on the condition that BN need not actually post the bond in the Tribal Court until BN "receives whatever federal review it properly seeks and is entitled to."

In procedural matters, the Crow Tribal courts seek guidance

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1. The timing of plaintiffs' request to reduce the judgment compels me to comment. Due respect for the weightiness of the trial judge's deliberations would normally dictate filing such a request with the Tribal Court, if at all possible, *before* its decision on the defendant's post-trial motion, which in this case was pending for more than 8 months.

from the federal rules. The filing of a notice of appeal generally divests the trial court of jurisdiction over the matters appealed from. *See, e.g., Smith v. Lujan,* 588 F.2d 1304, 1307-8 (9th Cir. 1979). This principle is a judge-made doctrine "designed to avoid the confusion and inefficiency that might flow from putting the same issue before two courts at the same time." 9 *Moore's Federal Practice* § 203.11 at 3-50 (2d ed., 1996). The procedure should avoid "endless paper shuffling" between the trial and appellate courts. *Id.; Kern Oil & Refining Co. v. Tenneco Oil Co.,* 840 F.2d 730, 734 (9th Cir. 1988). The main exceptions to the rule do not apply in this case because the motion was filed more than 10 days after the Tribal Court's order denying BN's post-trial motion. *See* Fed. R. App. P. 4(a)(4).

This court must therefore assume jurisdiction of plaintiffs' request to reduce the judgment. However, it seems problematic for this court to review a judgment it has entered, and it is uncertain whether we have the formal power to directly enter or amend a final judgment in any event. Accordingly, we will treat plaintiffs' request as a motion to remand to the Tribal Court for the limited purpose of entering an amended judgment as requested by plaintiffs. *See, e.g., Smith v. Lujan, supra,* 558 F.2d at 1307.

The court intends to grant plaintiffs' motion as a matter of right. The amendment would be effective retroactively to the date of entry of the original judgment. The proceedings on remand would presumably be limited to satisfactory affirmation, by affidavit or personal appearance, that the individual heirs or their legal guardians knowingly consent to reduce the judgments. The remand for this limited purpose will therefore probably not delay proceedings in this appeal. However, before fashioning that order, the court requests the parties' further comments on

how the amendment may affect this appeal, including the reasonableness of the judgment if that should be an issue on appeal, or whether it should be conditioned in any way to avoid prejudice to the defendant.

C. The Supersedeas Bond. BN has previously applied to the Tribal Court for a stay of execution of the judgment. In the previous proceedings before the Tribal Court, BN declined to post any bond or propose any alternative security arrangements. This court's assumption of jurisdiction over matters related to the stay and supersedeas bond is thus consistent with sound judicial policy and federal appellate practice. *See, e.g.*, Fed. R. Civ. P. 62(g); Fed. R. App. P. 8(a).

This court takes judicial notice that the United States Court of Appeals for the Ninth Circuit has issued an opinion in *Burlington Northern Railroad Company v. Red Wolf*, No. 96-35254 (9th Cir., Jan. 29, 1997), requiring the defendant to exhaust its Tribal court remedies before seeking a stay in the U.S. District Court. This court recognizes that defendants may seek further review of the bond issue with the Ninth Circuit and/or the Supreme Court, and understands that plaintiffs' motion to require a $30 million bond is intended to accommodate BN's federal court review rights.

In the meantime, provided that defendant files a proper motion in this court to stay execution of the amended judgment, this court intends to issue an order regarding the supersedeas bond required as a condition of the stay pursuant to Crow R. Civ. P. 18(b) after considering both parties' positions on the form and amount of the bond as expressed in the procedural briefing ordered herein.

Appendix A

In view of the requirements of time, and consistent with federal appellate practice (*see, e.g.*, Fed. R. App. P. 8(b) and 27(c); Ninth Circuit Rule 27-1(1)), this interim procedural order is issued by a single judge of the Court of Appeals. Now, therefore,

IT IS HEREBY ORDERED:

1. That the parties shall brief any or all of the foregoing issues, and such other procedural issues as the parties may deem necessary at this time, according to the following schedule:

(a) Appellant's brief or statement and supporting materials shall be filed on or before February 24, 1997, together with any motion for stay of execution and proposed security for the amended judgment; and

(b) Appellee's response shall be filed within 14 calendar days after receipt of appellant's brief.

The parties' procedural briefs shall be supported by copies of such portions of the record or by other materials as are necessary to determine the issues raised. The number of briefs and service requirement shall conform to Crow R. App. P. 9; counsel are requested to mail one of the copies of their briefs and supporting materials to the undersigned at 310 West Spruce, Missoula, MT 59802.

IT IS FURTHER ORDERED that:

2. All proceedings to enforce or execute on the judgment are STAYED until the defendant has exhausted or waived its

rights to seek federal court review of the requirement to post bond in the Tribal Court as a condition of obtaining a stay of execution pending this appeal;

3. Any further stay of execution shall be conditioned upon defendant filing a motion requesting the stay and posting security for the amended judgment as approved by further order of this court.

IT IS FURTHER ORDERED that:

4. The official caption of this appeal and the docket number shall be as they appear in the caption of this order.

5. The schedules for transmitting the record and filing briefs under Rules 8 and 10 of the Crow Rules of Appellate Procedure are VACATED, and those schedules shall be governed by order of the court, including this order.

6. Unless otherwise agreed by the parties and/or ordered by this court after the procedural briefing:

> (a) The record on appeal shall consist of the items listed in Crow R. App. P. 7(a). Unless otherwise ordered after the procedural briefing, the transcripts of the Tribal Court proceedings shall be in written form only;
>
> (b) Transcripts of any proceedings or statements in the Crow language shall include translations into English certified by the translator, and any disputes involving translations shall be addressed to this court as part of the procedural briefing provided for herein.

(c) The costs of transcripts, certified translations, and of duplicating one complete copy of the record pursuant to Crow R. App. P. 8(a) and (b) shall be paid by appellant upon its receipt of the Clerk of the Tribal Court's statement;

(d) The record on appeal shall be transmitted to the Court of Appeals promptly after the court's further orders following the procedural briefing (as specified therein), and upon receipt of the record, the Clerk of the Court of Appeals shall issue a Notice of Transmission of the Record to all parties;

(e) Appellant's principal brief on appeal shall be filed within thirty (30) calendar days following the date of the notice of transmission of the record;

(f) Appellees' response brief shall be filed within twenty-five (25) days after receipt of appellant's brief;

(g) Appellant shall be permitted to file a reply brief within ten (10) days after receipt of appellees' brief;

(h) The form of the parties' briefs on the merits should conform generally to Ninth Circuit Rules 28-1 and 28-2 as applicable, except that the maximum length shall be as provided in Fed. R. Civ. P. 28(g), and references to the record shall be made to page numbers of the Excerpts of the Record;

(i) The parties shall file with their briefs paginated "Excerpts of the Record" in conformance with Ninth Circuit Rule 30-1, except that the number of copies filed

shall be the same as the number of briefs specified in Crow R. App. P. 9(a); and

(j) All motions for extension of time must be supported by a sworn affidavit and state opposing counsel's position regarding the extension. Objections to any of the above procedures must be raised in the parties' procedural briefs. The parties are encouraged to enter into stipulations with respect to any procedural matter, and should file any such stipulations along with a form of order. In the meantime, should the Clerk of the Tribal Court require any assistance in assembling or duplicating the record, she should contact appellant's counsel.

DATED this 6th day of February, 1997

s/ William C. Watt
William C. Watt, Judge
Crow Court of Appeals

APPENDIX B — OPINION AND ORDER OF THE CROW COURT OF APPEALS FOR THE CROW INDIAN RESERVATION, CROW AGENCY, MONTANA FILED FEBRUARY 21, 1996

CROW COURT OF APPEALS
IN AND FOR THE CROW INDIAN RESERVATION
CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 94-31

ESTATES OF RED WOLF, and BULL TAIL,

Plaintiffs/Respondents,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Defendant/Appellant.

OPINION & ORDER

Defendant Burlington Northern Railroad Company (the "Railroad") appeals from the February 9, 1996 Order of the Crow Tribal Court (Arneson, J.), denying the Railroad's motion for stay of execution on the $250 million judgment entered against it on February 6, requiring the Railroad to post a supersedeas bond pursuant to Crow. R. Civ. P. 18(b), and setting a hearing for approval of the Railroad's proposed bond for February 20, 1996. In addition, Railroad applies to this Court for a stay of the judgment and a waiver of the requirement to post a surety bond pursuant to the guidance provided by Fed. R. App. P. 8(a).

Appendix B

Shortly after filing this appeal and application on February 12, the Railroad also filed an action in the U.S. District Court for the District of Montana, Cause No. CV 96-17-BLG-JDS. That Court on February 15, 1996, granted a Temporary Restraining Order enjoining Judge Arneson and the plaintiffs from enforcing the judgment and ordering them to appear for a hearing on a permanent injunction on February 26, 1996. This is the second federal court TRO enjoining the conduct of Judge Arneson's duties since the beginning of the year issued upon the application of a litigant that was also pursuing its appellate review rights in this Court. *See Big Horn County Electric Cooperative, Inc. v. Adams, et al.*, Cause No. CV 95-194-BLG-JDS (TRO issued January 3, 1996; case dismissed February 15, 1996).

In support of its appeal and application, the Railroad argues that this case presents important questions of Tribal tort law, and under the Indian Civil Rights Act, (25 U.S.C. § 1302 *et seq.*), which should be briefed and decided "without the distraction of collateral enforcement litigation." The Railroad also argues that a bond is not warranted because of its obvious ability to pay the judgment, as evidenced by the financial statements attached to the Affidavit of Gary L. Crosby which was presented to the Tribal Court. Mr. Crosby is the Vice-President — Litigation for Burlington Northern Santa Fe Corporation, which owns Burlington Northern Inc., which in turn owns Burlington Northern Railroad Company and its subsidiaries. According to the Form 10Q filed with the Securities Exchange Commission for the period ending September 30, 1995, the Railroad had net assets of $3.36 billion and year-to-date revenues of $4 billion and net income of $431 million. Crosby Aff. Exh. B. The Railroad rests its primary contention on the "well-settled" principle in the federal system that requiring

it to post a bond in these circumstances amounts to an abuse of discretion by the lower court.

The plaintiffs filed an opposition to the Railroad's application on February 15, pointing out that it was premature because no notice of appeal had been filed, and that Railroad has not made a showing of its inability to obtain a bond. Plaintiffs urge this Court defer to the Tribal Court's discretion in this matter and acquire the Railroad to post a bond to ensure payment of the judgment.

This application also constitutes the third time the Railroad has sought interlocutory relief in this Court since January 3, 1996. Prior to this application, its concurring appeal of the Tribal Court's denial of Bonnie Little Nest's motion to intervene was dismissed as untimely; and its motion for emergency stay of proceedings, appealing several of the Tribal Court's pre-trial rulings, was dismissed on January 29, 1996, for lack of appellate jurisdiction over a final order or judgment. This application, too, must be denied as premature.

As a threshold matter, the Crow Rules of Appellate Procedure do not contain a rule expressly authorizing the Court of Appeals to stay a judgment or approve a supersedeas bond, as does Fed. R. App. P. 8(a). We approve the policy embodied in Rule 8, and followed by the judgment debtor here, of seeking relief in the first instance in the Tribal Court. We have also followed the provision in Fed. R. App. P. 8(a) allowing consideration of this application by a single judge of the Court of Appeals in these exceptional circumstances. In the case of a final judgment which is the *subject of a pending appeal* before this Court, the Tribal Court's *final orders* relating to stay of the judgment, and to the bond or other security given as a condition

of the stay, are final orders subject to review by the Court of Appeals for abuse of discretion pursuant to Crow Tribal Code § 3-1-103(2) and Crow R. App. P. 1 and 3(a).

In this case, the judgment was not the subject of a pending appeal when the applications for stay were filed with the Tribal Court or this Court, or when the U.S. District Court issued its TRO at the Railroad's request. The provisions for staying the judgment and posting bond in Fed. R. Civ. P. 62(c) and Fed. R. App. P. 8 presuppose the existence of a valid appeal. 9 *Moore's Federal Practice* ¶ 208.06 at 8-16 (2d ed. 1995), *citing Century Laminating Ltd. v. Montgomery*, 595 F. 2d 563 (10th Cir. 1979). The Railroad has since tendered a notice of appeal dated February 16, 1996, which the Clerk duly filed on February 20.

Assuming the existence of a valid appeal, the Tribal Court's order lacks finality because the Tribal Court has not yet had the opportunity to exercise its discretion in approving a specific bond or in setting its amount. Moreover, the Railroad has not yet offered any evidence concerning the cost of a bond or its inability to obtain a bond of this size, nor has it proposed other forms or combinations of security for the Tribal Court's consideration. Even under the federal rules, "Rule 8 may not be used as a means of appealing a determination by the district court pursuant to Civil Rule 62, to which the appeals court will defer absent an abuse of discretion." 9 *Moore's Federal Practice* ¶ 208.04 at 8-13 (2d ed. 1995-96 Supp.). "We shall not use Rule 8 to undermine the district judge's discretion." *Lightfoot v. Walker*, 797 F. 2d 505, 507 (7th Cir. 1986). Adhering to this wise principle, the Court declines to review the Tribal Court's Order dated February 9, or to consider the Railroad's application for stay and waiver of bond until after the Tribal Court has

entered final orders concerning the specific security required as a condition of a stay of the judgment.

Although we decline to review the Tribal Court's order at this time, because of the unusual size of the judgment and both parties' important interests in promptly resolving these issues, we provide general guidance in this opinion for the Tribal Court's further deliberations with respect to requiring security for the judgment during the pendency of the appeal.

As the Tribal Court noted, Rule 18(b) of the Crow Rules of Civil Procedure by its terms requires an appellant to post surety bond on or before the date of filing an appeal as a condition for obtaining a stay of execution of the judgment. In federal practice, too, posting a supersedeas bond in the amount of the judgment, plus interest, costs on appeal, and damages for the delay, is the normal requirement. *Poplar Grove, Etc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979) (reversing the district court's requirement for a $10,000 bond on a $270,000 judgment and remanding to "establish some type of positive protection of the judgment creditor's rights" or to vacate the reduced bond). The purpose of the bond is to protect the non-appealing party against any loss sustained as a result of having to forego execution of the judgment pending the appeal. *Id.* It also allows the judgment creditor to "avoid the risk of satisfying the judgment only to find that restitution is impossible after reversal on appeal." *Id.* Thus, the ability to post a bond is a "privilege extended the judgment debtor," who in turn bears the burden to objectively demonstrate the reasons for departing from the requirement for a full security bond. *Id. See also, International Wood Processors v. Powder Dry, Inc.*, 102 F.R.D. 212 (D.S.C. 1984) (requiring $2.8 million bond for amount of judgment when appellant did not present financial information and most assets were located outside the district).

Appendix B

The federal courts have exercised discretion in reducing the amount of the bond, or providing for other forms of security, when circumstances warrant. See 9 *Moore's Federal Practice* ¶ 28.06[2] at 8-18. In *Poplar Grove*, the Fifth Circuit provided the following direction to the district court on remand:

> If a judgment debtor objectively demonstrates a present financial ability to facilely respond to a money judgment and presents to the court a financially secure plan for maintaining that same degree of solvency during the period of an appeal, the court may then exercise a discretion to substitute some form of guaranty of judgment responsibility for the usual supersedeas bond. Contrariwise, if the judgment debtor's present financial condition is such that the posting of a full bond would impose an undue financial burden, the court similarly is free to exercise a discretion to fashion some other arrangement for substitute security through an appropriate restraint on the judgment debtor's financial dealings which would furnish equal protection to the judgment creditor.

Poplar Grove, supra, 600 F.2d at 1191. Under this guidance from the Fifth Circuit, the judgment creditor is entitled to some effective form of security even if the district court decides to waive the requirement for a bond.

Other federal courts have waived the bond for solvent defendants in certain circumstances without requiring security.

Appendix B

In *Federal Prescriptive Service v. American Pharmaceutical Assn.*, 636 F.2d 755, 760-61 (D.C. Cir. 1980), the court construed Fed. R. Civ. P. 62(g) and Fed. R. App. P. 8(a) to authorize an unsecured stay of a $102,000 judgment when (1) both parties were appealing on the merits, (2) the judgment debtor's net worth of $4.8 million was about 47 times the amount of the judgment, and (3) the judgment debtor was a long-time District resident. As noted above, the Crow Tribal Code does not contain similar provisions to the federal rules relied on in that case.

The Seventh Circuit has developed a five-part test for waiving the bond requirement. See *Dillon v. City of Chicago*, 866 F.2d 902, 904-905 (7th Cir. 1988). (The Tribal Court considered this test in reaching its February 9 Order requiring a bond.) The court in *Dillon* reversed the district court's requirement to transfer funds to the Clerk of Court in the full amount of the $115,360 employment discrimination judgment against the City of Chicago, having been persuaded that the City's previously appropriated $454 million payroll fund together with procedures which would normally ensure payment of the judgment within 30 days were sufficient security without the need for posting a bond. *Id.* at 905.

In another case arising in the Seventh Circuit, the district court in *In re Oil Spill by the Amoco Cadiz*, 744 F. Supp. 848, 850 (N.D. Ill. 1990), waived the bond requirement for Amoco and the Republic of France. With respect to Amoco, the court based its waiver on the evidence that Amoco's quarterly net income was 3 times the amount of the judgment, and many of its assets were located within the United States. The court also noted that Amoco promised to file quarterly reports to assure the court of its continued ability to respond to the judgment.

Id. at 850 n. 2. With respect to France, the court observed that bond was not necessary on the $35 million judgment in favor of Amoco, because France also had a $100 million judgment against Amoco that could be used to offset its liability. *Id.* In contrast, the court required the other judgment debtor, Astilleros Expanole, to post a bond because it had no assets within reach of the federal court, and had consistently refused to recognize the court's jurisdiction during the course of proceedings in that case. *Id.* at 850-51. This latter holding was relied upon by the Tribal Court in its February 9 order.

In other cases involving judgment debtors with large assets, the Seventh Circuit has insisted on a bond or other adequate security. In *Lightfoot v. Walker*, 797 F.2d 505, 506 (7th Cir. 1986), the court required the State of Illinois to post a full bond on a $710,501 attorneys' fee judgment when the procedure for collecting a judgment against the state was cumbersome, time-consuming and uncertain, since it could not be paid until the legislature appropriated the funds. The court also observed that the only offsetting concern was the cost of the bond, usually one percent or $7,000, which was only "a modest amount." *Id.* at 507.

In *Olympia Equipment v. Western Union Telegraph Co.*, 786 F.2d 794 (7th Cir. 1986), Judge Posner, writing for the court, affirmed the district court's waiver of bond on a $36 million judgment against Western Union when the district court provided for adequate alternate security arrangements. Western Union Telegraph, the principal subsidiary of Western Union Company (similar to the relationship between the Railroad and Burlington Northern Inc. in this case), had total assets worth $2 billion, but was financially distressed and illiquid, and claimed it was unable to obtain a bond. *Id.* at 796. The alternate

security arrangements consisted of pledges of (1) $10 million in cash, (2) $10 million in accounts receivable, and (3) a security interest in some of the company's physical assets purportedly worth $70 million. *Id.* Before turning to the fundamental issue of the adequacy of the alternate security, the Court of Appeals questioned the company's inability to obtain a bond if it had offered to pay more than the customary 1% fee, and likewise questioned the parties' failure to explore the possibility of a partial bond that would secure only the compensatory damages portion of the judgment (e.g., $12 million). *Id.* at 797. The court then noted a more serious problem with the district court allowing the telegraph company to transfer cash to its parent, who ordinarily would not be liable to the judgment creditor. *Id.* at 798. In light of a pending sale of a division of the telegraph company, the court modified the district court's order and forbid any cash transfers to the parent unless the parent agreed to be bound on the judgment to the extent of the transfers (or the parent posted its own bond in this regard). *Id.* at 799.

In a case involving one of the largest federal court judgments in its time, the U.S. District Court for the Southern District of New York in 1970 allowed alternate security as a condition for staying TWA's $145 million antitrust default judgment against Hughes Tool Co. *See Trans World Airlines, Inc. v. Hughes*, 515 F. 2d 173, 175 (2d Cir. 1975). The course of the proceedings to determine the form of security may be instructive in this case. In *Hughes*, the court held a "number of hearings at which TWA and Toolco [Hughes] expressed their diametrically opposed positions with respect to the need for a bond to protect the judgment pending appeal." *Id.* at 176. Hughes, with a $500 million net worth, argued against any bond, and offered instead to create a lien on specific property valued at $45 million (the

amount of the compensatory damages). *Id.* TWA insisted upon a bond in the full amount of $161 million as provided by the local rules. *Id.* at 176-177. After concluding that posting the full supersedeas bond was not practicable under the circumstances, the district court allowed alternate security arrangements in the form of (1) a $75 million letter of credit in favor of TWA (in lieu of a bond), and (2) the $86 million balance secured by Hughes' commitment to maintain Toolco's net worth at three times that amount (or $335 million). *Id.* at 177. Compliance with this latter commitment would be certified by quarterly audited balance sheets. *Id.* At the court's direction, and "[a]fter the usual sparring," the parties came up with the details of this alternate security arrangement. *Id.*

The Second Circuit's decision in *Trans World Airlines v. Hughes, supra*, stands for the proposition that it is not always to the Appellees' advantage to insist on a large bond regardless of Appellant's cost. *See also*, 9 *Moore's Federal Practice* ¶ 208.06[2] at 18-19. After the Hughes defendants obtained a reversal by the U.S. Supreme Court, the district court awarded as costs on appeal, pursuant to Fed. R. Civ. P. 39(a) and (e), the $1,015,625 fee incurred by the Hughes defendants for the $75 million letter of credit (at one-half percent per annum). *Hughes* 515 F. 2d at 175. On appeal, the Second Circuit also allowed as costs taxable against TWA the $617,765 charges incurred for the quarterly audits, because they represented a cost effective substitute security for the $86 million balance secured by the company's net forth, and this alternative was cheaper than the premium for a supersedeas bond or the fee for a letter of credit. *Id.* at 177-78. Although we are not called upon here to speculate as to the possibility of a discretionary award of costs on appeal under Crow R. App. P. 15 if the judgment is reversed or modified, it is worth noting that plaintiffs/appellees in this case

bear some degree of exposure to liability for reimbursing some of the Railroad's costs of providing adequate security for the judgment.

Finally, the federal courts' treatment of security for Pennzoil's $11.1 billion judgment against Texaco awarded by the state district court in Houston, Texas, bears mentioning. *See Pennzoil Company v. Texaco, Inc.*, 481 U.S. 1, 4 (1987). In that case, even before the Texas court's judgment was entered, Texaco filed a separate action in the U.S. District Court for the Southern District of New York to enjoin enforcement of the judgment. *Id.* at 6 n. 5. Texaco argued that the apparently mandatory bond requirements of Texas law, together with other rights of a Texas judgment creditor, violated various federal statutes and its constitutional rights. *Id.* at 6. The district court accepted jurisdiction and granted a preliminary injunction, but conditioned the injunction on Texaco's posting *a bond in the amount of $1 billion. Id.* at 8 n. 7. Thus, although it only partially secured the judgment, a bond of this size was authorized by a federal district court even when it found that Texaco's appeal had a reasonable probability of success, *id.* at 8, and Texaco's assets were admittedly sufficient to satisfy the judgment without liens or a bond, *id.* at 19-20 (Breenan, J., concurring). The Second Circuit subsequently affirmed, but the Supreme Court reversed, holding that the federal courts should have deferred to the interests of allowing state courts to enforce their own judgments, based on principles of comity. *Id.* at 17.

Applying these teachings to the facts developed thus far in the instant case, we find that it is not at all "well settled" that the Railroad would be entitled to a waiver of the supersedeas bond under federal law. The Railroad's reported net assets as of September, 1995, were to 13 times the amount of the judgment.

Crosby Aff. Exh. B ($3.36 billion divided by $250 million). Its average quarterly net income during 1995 was less than 60% of the amount of the judgment, and the $29 million in cash and cash equivalents reported on its balance sheet represents less than 12% of the amount of the judgment. *Id.* These ratios are substantially less than the ones involved in *Federal Prescriptive Service* (net assets of 47 times the judgment), *Dillon* ($454 million payroll fund to satisfy $115,000 judgment), and *Amoco Cadiz* (quarterly net income of 3 times amount of judgment), *supra*, in which the federal courts waived the requirement for a supersedeas bond. Of particular concern is the Railroad's failure to explain in even general terms how it would come up with an additional $220 million in cash to pay the judgment (plus costs and postjudgment interest).

The Railroad is part of a complicated corporate structure involving multiple layers of subsidiaries, Crosby Aff. Exh. B, in an industry that has undergone substantial restructuring (witness BN's recent merger with Santa Fe). Against this backdrop, the Railroad has not made any representations about maintaining its net worth or its liquidity to pay the judgment, nor has it offered any protections against large amounts of its assets being transferred to its parent or some other entity in connection with a merger or acquisition. In this rapidly-changing world, it would be naive to blindly assume that the Railroad will necessarily have sufficient assets reasonably available to respond to a judgment of this size if the judgment is ultimately affirmed after what could be several years of further litigation. In these circumstances, the federal courts have required varying degrees of assurances in lieu of posting the full amount of the bond. *See Amoco Cadiz* (quarterly financial statements), *Olympia Equipment* (pledges of specific property and cash transfers to parent conditioned on assuming liability for

judgment), and *Hughes* (quarterly certifications that net worth continued to exceed 3 times the amount of judgment), *supra*.

Finally, based on the record before us, the Tribal Court's concerns with the Railroad's refusal to recognize its jurisdiction do not appear to be unreasonable. Rather than offering any assurances of payment in lieu of a bond, the Railroad in its application to this Court has remained extremely equivocal about the plaintiffs' ability to enforce its Tribal Court judgment in the other courts of the land:

> It is not uncommon for litigants to *attempt* to enforce tribal judgments in either state or federal courts and thus, the assets of Burlington Northern *may* be within reach of this court *if* the judgment is enforced in either federal or state court.

Railroad's Application dated February 12, 1996 at 6 (emphasis added). Judge Hatfield's recent decision in *Wilson v. Marchington and Inland Empire Shows*, 20 Mont. Fed. Reptr. 297 (Jan. 24, 1996), may help alleviate this concern, but leaves plenty of room for further argument under the specific facts of each case. The Railroad's obtaining a TRO from the U.S. District Court before it had even perfected its appeal suggests that it intends to make use of every possible opportunity to resist execution of the judgment should it be sustained on appeal.

In view of the foregoing, we provide the following guidance to the Tribal Court with respect to further proceedings on adequate security arrangements as a condition of the stay requested by the Railroad:

Appendix B

1. Rule 18(b) of the Crow Rules of Civil Procedure by its terms requires Railroad to post a surety bond "sufficient to guarantee performance of the judgment, and payment of costs on appeal." In view of the size of this judgment, however, and the possible unavailability or prohibitive costliness of obtaining a bond, the Tribal Court should consider some combination of a bond and adequate alternate security. These could include a properly structured letter of credit, posting of cash or negotiable government securities, pledges of specific physical assets, express guaranty of payment, maintenance of a specified net worth, and/or protections against transfers of liquid assets, as described in the cases, *supra*. In any event, we believe that Rule 18(b) requires that at least a substantial portion of the judgment should be secured by a supersedeas bond, and the remainder of the judgment should be fully secured. The Railroad bears the burden of demonstrating that alternate forms of security will provide protections equivalent to those afforded by a surety bond.

2. Upon a proper showing by the Railroad of the cost and difficulty in obtaining a bond, the Tribal Court should conduct such further hearings as are reasonably necessary to determine adequate security arrangements. Stipulations by the parties as to the details of those arrangements should be encouraged. However, since delay in posting security works to the disadvantage of plaintiffs, an immediate partial bond should be the prerequisite for extending the stay until all the security arrangements are resolved.

3. The Tribal Court's ultimate determinations on the stay and security arrangements will be treated with great deference by this Court.

4. Based on principles of comity, the Tribal Court should

stay all proceedings to actually execute on the judgment and any requirement for actually posting security during the pendency of any restraining orders issued by the U.S. District Court. However, we do not read that Court's TRO as preventing the Tribal Court from conducting further proceedings to determine the form of security. In fact, since the TRO has the effect of staying the judgment without any security, the Tribal Court should proceed to make its determinations so that the security arrangements (at least a substantial partial bond) may be implemented immediately upon the lifting of any restraining orders by the U.S. District Court.

IT IS HEREBY ORDERED that the Railroad's application for stay of judgment and waiver of supersedeas bond is DENIED.

DONE AND DATED this 21st day of February, 1996.

s/ William C. Watt
William C. Watt
Judge, Crow Court of Appeals

APPENDIX C — OPINION AND ORDER OF THE CROW COURT OF APPEALS FOR THE CROW INDIAN RESERVATION, CROW AGENCY, MONTANA DATED JUNE 17, 1997

IN THE CROW COURT OF APPEALS
IN AND FOR THE CROW INDIAN RESERVATION
CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 97-010

ESTATES OF RED WOLF and BULL TAIL,

Plaintiffs-Appellees,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Defendant-Appellant.

OPINION AND ORDER ON SURETY BOND

Defendant-Appellant Burlington Northern Railroad Company[1] has moved the court for a stay of execution on the judgment in this case, without a requirement that it post bond or any other form of security. According to the railroad, the motion is conditional, because it need not be addressed until the U.S. District Court's injunction barring enforcement of the judgment is vacated. *See Burlington Northern Railroad Co. v. Estate of Red Wolf, et al.*, 106 F.3d 868 (9th Cir. 1997), *petition for cert. filed* (U.S. May 16, 1997) (No. 96-1853).

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1. As a result of a merger effective December 31, 1996, the defendant corporation's name is now Burlington Northern and Santa Fe Railway Company. Crosby Aff. ¶ 2.

Appendix C

In light of the Ninth Circuit's decision cited above, Plaintiffs-appellees object to any further stay of execution on the judgment without the railroad being required to post a surety bond. However, it is these judgment creditors' position that while a bond in the full amount of the judgment, plus interest, must be posted immediately, they do not object to barring any execution on the bond until the railroad exhausts its federal review rights. We agree with the plaintiffs-appellees' position as being reasonable and compelled by Tribal law.

The judgment appealed from in this case was originally entered on February 6, 1996, in the aggregate amount of $250 million. The railroad requested the Tribal Court to waive the requirement in Rule 18(b) of the Crow Rules of Civil Procedure for posting a surety bond as a condition of a stay pending appeal. The Tribal Court denied the stay on February 9, 1996, and scheduled a hearing for approval of the surety bond.

The railroad immediately appealed the denial of the stay to this court, and without waiting for this court's decision or the Tribal Court' hearing, it obtained a restraining order and later a preliminary injunction from the U.S. District Court against the plaintiffs and the Honorable Tribal Court Judge. *Burlington Northern Railroad Company v. Estate of Red Wolf*, Cause No. CV 96-17-BLG-JDS (TRO dated Feb. 15, 1996). A divided panel of the U.S. Court of Appeals for the Ninth Circuit reversed and remanded on January 29, 1997, directing that the injunction be dissolved and the Federal court case stayed or dismissed pending the railroad's exhaustion of its remedies in the Tribal courts. *Red Wolf, supra*, 106 F.3d at 871. After the usual post-decisional motions were denied, the railroad filed a petition for writ of certiorari on May 16, 1997, which remains pending.

Appendix C

Meanwhile, twelve days after the Tribal Court denied the stay, a single judge of this court issued an expedited opinion and order denying the appeal as premature, but providing guidance to the Tribal Court on the requirements for the bond or other form of security under Crow R. Civ. P. 18(b). *Estates of Red Wolf and Bull Tail v. Burlington Northern Railroad Co.*, Civ. App. Docket No. 94-31 (Feb. 21, 1996). In that opinion, which the full panel adopts, the court held that (1) the requirement for fully securing the judgment is a mandatory requirement for the stay under the Tribal code, and (2) a substantial portion of the judgment must be secured by a surety bond, but (3) considering the magnitude of the judgment, some combination of other forms of security for the remainder would be within the Tribal Court's discretion. However, in further Tribal court proceedings relating to the bond, the railroad refused to post a bond of any kind, or to propose any other alternative forms of security.

This court again assumed jurisdiction of this case after the Tribal Court denied the railroad's post-trial motions on December 30, 1996. On January 28, 1997, the plaintiffs filed a "Notice and Request" for voluntary reducing the judgment to a total of $25 million, or $5 million per heir. In that Notice, the plaintiffs also requested that the railroad be required to post a $30 million bond to guarantee payment of the amended judgment plus interest, and with the "additional condition that any payment thereon shall not be required until the [railroad] receives whatever federal review it properly seeks and is entitled to." Notice and Request at 4.

This court on February 6, 1997, issued an Order Governing Conduct of Appeal which, among other things, indicated the court's intention to remand to the Tribal Court for the limited

purpose of amending the judgment to the reduced amount, and requested the parties to brief certain procedural issues. The parties did not object to the limited remand for amending the judgment, and a separate remand order is being issued concurrently with this opinion and order. All further references to the judgment in this opinion are to the amended judgment which we have directed the Tribal Court to enter.

This court's February 6 order also assumed jurisdiction over the surety bond issue. The order stayed further proceedings to enforce the judgment until the railroad exhausted or waived its rights to Federal court review of the requirement to post bond with the Tribal Court. We reconsider that order, along with the railroad's request for a further stay without the requirement to post bond, in light of the parties' procedural briefs.

There is a certain facial attractiveness to the prudential concept of staying Tribal court enforcement proceedings until the judgment debtor has exhausted its Federal court remedies without posting a bond. It may be argued on grounds of comity and sound judicial administration that it doesn't make sense to require a bond to be posted while there is any chance that the Supreme Court will grant the certiorari petition and reinstate the district court's injunction.[2] However, deferring to the Federal courts in these circumstances only leads us in a circle, because they, in turn, have been directed to stay their hands as a matter of comity until Tribal court remedies are exhausted. Thus, in light of the Ninth Circuit's clear directive to dissolve the Federal court injunction, we must vacate paragraph 2 of this court's February 6th order, and turn to the railroad's arguments in support of a continuing stay without bond.

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2. We consider this possibility without presuming that this case, in its current procedural posture, merits the attention of Supreme Court of the United States.

Appendix C

We start with the express requirement of Tribal law, as discussed and upheld in this court's opinion of February 21, 1996, that posting security for the full amount of the judgment is mandatory under the language of Crow R. Civ. P. 18(b). We examine the railroad's arguments to determine if some overriding emergency or inequity would result from requiring the railroad to post a $30 million bond.

First, the railroad points out that there can be no question of its ability to satisfy the reduced judgment. In lieu of any security, the railroad offers to provide quarterly SEC filings periodically to the parties and the court. BN Brief at 5. Although its assets on the Reservation are not sufficient to satisfy the judgment, the railroad is not the type of entity that can conceal its extensive physical assets located throughout the United States. *Id.* This is consistent with the railroad's openly avowed strategy of forcing the plaintiffs to execute against off-reservation assets (which would not be necessary once a bond were posted with the Tribal Court). BN Brief at 8.

The railroad thus frames the question as whether it must sacrifice its assets by posting bond in order to preserve its review rights beyond this court. *Id.* It is apparent that the import of the railroad's request is to allow it to use special proceedings to enforce the equivalent of a foreign-country judgment as a device for obtaining review of Tribal Court due process in various *state* courts in other jurisdictions where the railroad's off-reservation assets are located. *See* BN Brief at 8-9 and notes 7 and 8.

We cannot create an exception to express statutory law in order to accommodate this strategy of attrition. We are confident that whatever extra-Tribal remedies the railroad may have after

this court completes its review will be appropriately protected by the Federal courts. *See, e.g., Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997). Conditioned as proposed by the plaintiffs, the bond would accommodate whatever federal review rights are determined to exist so that the railroad's property will be fully protected until it has had the opportunity to seek review of the judgment by the highest court in the land. That seems fair enough to us.

Next, the railroad argues that it is unjust to require it to post bond considering the excessive size of the judgment together with the serious questions it will raise regarding the conduct of the trial, and the plaintiffs' apparent inability to reimburse the cost if the railroad prevails on appeal. We have thrice previously declined to review the Tribal Court proceedings in this case on a piecemeal basis, and we decline again here to review the merits of the judgment in this ancillary proceeding. It is sufficient at this point to observe that the railroad's authorities regarding compensatory damages for non-economic losses are not controlling, and a multi-million dollar verdict in a wrongful death action has not been held by this court to be unconscionable *per se*.

Finally, the railroad argues that if a bond is required and it refuses to post the bond, its 50 miles of mainline track and critical unit-train coal traffic will be disrupted. This will result in extra cost to its customers, power blackouts in the Midwest, and the eventual crippling of America's industrial economy. BN Brief at 6; Robb Affidavit ¶¶ 3-4 (Exh. 4 to Motion for Stay). While some of those injuries may be irreparable, they are certainly and completely avoidable by the railroad simply posting the bond. As discussed above, this requirement cannot be held to be inequitable, when execution on the bond is conditioned upon exhaustion of Federal court review rights.

Appendix C

The issue of whether execution on the railroad's Reservation assets is pre-empted by federal law is not before us at this time. Expiration of the stay for failure to post bond would not necessarily result in execution against Reservation trackage (or necessarily limit execution on the judgment to those assets). Unless and until that series of eventualities must be dealt with in due course, this court will turn its attention to deciding the merits of the appeal. Toward that end, the court has settled questions on the composition of the record on appeal and established a briefing schedule in a separate order.

For the reasons stated above,

IT IS HEREBY ORDERED that:

1. Burlington Northern's conditional motion for stay of execution of the judgment without posting bond is DENIED;

2. This court's order in paragraph 2 of its Order Governing Conduct of Appeal dated February 6, 1997 (which stayed enforcement proceedings pending exhaustion of Burlington Northern's federal review rights) is VACATED;

3. Consistent with Crow R. Civ. P. 18(a), proceedings for enforcement of the judgment are STAYED until ten (10) days after entry of the Tribal Court's amended judgment on the limited remand; and

4. A further stay of proceedings to enforce the judgment shall be granted by the Tribal Court if appellant posts an acceptable surety bond with the Tribal Court in the aggregate amount of $30 million *before* the expiration of the stay ordered in paragraph 3 above, with the protective condition on the bond

that it will not be executed upon until Burlington Northern receives whatever Federal court review of the judgment to which it is entitled. Any deviation from the foregoing language as a condition on the bond shall be entertained by the Tribal Court only upon the stipulation of the parties.

DATED this 17th day of June, 1997.

s/ Victoria White
Victoria White, Chief Judge
Crow Court of Appeals

s/ Glen Birdinground
Glen Birdinground, Judge
Crow Court of Appeals

s/ William C. Watt
William C. Watt, Judge
Crow Court of Appeals

APPENDIX D — PROCEDURAL ORDER OF THE CROW COURT OF APPEALS FOR THE CROW INDIAN RESERVATION, CROW AGENCY, MONTANA DATED JUNE 17, 1997

IN THE CROW COURT OF APPEALS
IN AND FOR THE CROW INDIAN RESERVATION
CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 97-010

ESTATES OF RED WOLF and BULL TAIL,

Plaintiffs-Appellees,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY, a corporation,

Defendant-Appellant.

LIMITED REMAND ORDER AND REVISED ORDER GOVERNING CONDUCT OF APPEAL

The parties having filed briefs regarding the procedural questions raised in the Court's Order Governing Conduct of Appeal dated February 6, 1997, the Court issues this revised order which, for convenient reference, replaces the previous order in its entirety. A separate order is being issued concurrently regarding the stay of the amended judgment and the supersedeas bond. Now, therefore,

IT IS HEREBY ORDERED that:

1. This case is REMANDED to the Tribal Court for the

limited purpose of entering an amended judgment *nunc pro tunc* (i.e., retroactive to the date the original judgment was entered) in the amount of $5 million per heir, or $25 million total, plus post-judgment interest at ten percent (10%) per annum from February 6, 1996. The Tribal Court's inquiry on remand shall be limited to the sufficiency of the plaintiffs' affidavits consenting to the reduced judgment, which were filed with the Tribal Court during March, 1997, or such other evidence of the plaintiffs' knowing consent that the Tribal Court deems necessary. The judgment shall recite that it is without prejudice to the defendant's right to seek full review of the amended judgment.

IT IS FURTHER ORDERED that:

2. The parties in their appellate briefs shall address any issues they deem pertinent with respect to the Tribal Court's jurisdiction in light of the Supreme Court's decision in *Strate v. A-1 Contractors*, __ U.S. __, 117 S. Ct. 1404 (1997).[1] The parties may supplement the record with copies of such public records as they believe are relevant to the jurisdictional inquiry, including but not limited to treaties, statutes, Tribal ordinances, and right-of-way documents. These materials shall be set forth in a separate appendix annexed to the briefs.

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1. Based on our initial reading, Tribal Court jurisdiction in this case is not controlled by the Court's recent decision in *Strate v. A-1 Contractors*. The defendant's ownership and use of its right-of-way differs fundamentally from a motorist's use of a state highway, and has different implications for the exceptions to the Montana test, if that test applies here at all. Moreover, because of the nature of these differences and appellant's long-term and continuing presence on the Reservation, the Tribal Court's assertion of jurisdiction in this case does not require the railroad to defend in an "unfamiliar court." *Id.*, 117 S. Ct. at 1416. We therefore do not regard this case as one where it is evident that the Tribal Court lacks jurisdiction and the Federal court exhaustion requirement does not apply. *Id.* at 1416 n. 14.

Appendix D

IT IS FURTHER ORDERED that:

3. The official caption of this appeal and the docket number shall remain as they appear in the caption of this order for all appellate proceedings subsequent to the entry of the amended judgment. The Appellant's notice of appeal shall be deemed to be timely filed, without the necessity of filing another notice of appeal.

4. The schedules for transmitting the record and filing briefs under Rules 8 and 10 of the Crow Rules of Appellate Procedure are VACATED, and those schedules shall be governed by order of the court, including this order.

5. The record on appeal shall be transmitted promptly *after* the Tribal Court enters the amended judgment. One complete copy of the record, together with the original exhibits, shall be transmitted to the Court of Appeals pursuant to Crow R. App. P. 8(b). Except as listed in below, the record on appeal shall consist of the items listed in Crow R. App. P. 7(a), and the transcripts of the Tribal Court proceedings shall be in written form only.

(a) A copy of the videotape of Hon. Donald Stewart's address to the venire (*see Burlington Northern Railroad Company v. Red Wolf*, 106 F.3d 868, 872 (9th Cir., 1997) (Kleinfeld, J., dissenting), shall be included in the record. No other videotapes shall be included in the record on appeal.

(b) A transcription of the audiotapes of proceedings prior to December 12, 1994 (*see* BN's procedural brief at 11), shall be included in the record, or a statement thereof

as provided in Crow R. App. P. 7(b). The appellant shall be responsible for preparing the transcription or statement.

(c) Transcripts of any proceedings or statements in the Crow language shall include translations into English certified by the translator, and the record shall include any such translations submitted prior to the date of transmission.

(d) The costs of transcripts, a certified translation, and of duplicating one complete copy of the record pursuant to Crow R. App. P. 8(a) and (b) shall be paid or reimbursed by Appellant upon its receipt of the Clerk of the Tribal Court's statement(s).

(e) The Clerk of the Court of Appeals shall serve a Notice of Transmission of the Record on the parties' counsel.

6. The form and filing times for the parties' appellate briefs shall be as follows:

(a) Appellant's principal brief on appeal shall be filed within thirty (30) calendar days following the date of the notice of transmission of the record;

(b) Appellees' response brief shall be filed within twenty-five (25) days after receipt of appellant's brief;

(c) Appellant shall be permitted to file a reply brief within ten (10) days after receipt of appellees' brief;

(d) The form of the parties' briefs should conform generally to Ninth Circuit Rules 28-1 and 28-2 as

applicable, except that the maximum length shall be seventy (70) pages for the parties' principal briefs and twenty-five (25) pages for the reply, and references to the record shall be made to page numbers of the Excerpts of the Record; and

(e) The parties shall file with their briefs paginated "Excerpts of the Record" in conformance with Ninth Circuit Rule 30-1, except that the number of copies filed shall be the same as the number of briefs specified in Crow R. App. P. 9(a).

7. The Court will schedule oral argument by further order.

8. All motions for extension of time must be supported by a sworn affidavit and state opposing counsel's position regarding the extension.

DATED this 17th day of June, 1997.

s/ Victoria White
Victoria White, Chief Judge
Crow Court of Appeals

s/ Glen Birdinground
Glen Birdinground, Judge
Crow Court of Appeals

s/ William C. Watt
William C. Watt, Judge
Crow Court of Appeals

Supreme Court, U.S.
FILED
JUL 9 1997
OFFICE OF THE CLERK

No. 96-1853

In the Supreme Court of the United States

OCTOBER TERM, 1996

BURLINGTON NORTHERN RAILROAD COMPANY, PETITIONER

v.

ESTATES OF RED WOLF AND BULL TAIL, VALERIE RED WOLF, GLADYS RED WOLF, RANDY RED WOLF, DORRIE BULL TAIL, DEWEY BULL TAIL, AND RON ARNESON, CROW TRIBAL COURT SPECIAL JUDGE, RESPONDENTS

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

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National Farmers Union Ins. Cos. v. Crow Tribe,
471 U.S. 845 (1985) 1, 2

Strate v. A-1 Contractors,
117 S.Ct. 1404 (1997) ..... *passim*

Strate v. A-1 Contractors, 117 S.Ct.1404 (1997), requires reversal of the Ninth Circuit's decision in this case or, at the very least, a GVR to enable the Ninth Circuit to reconsider its decision in light of *A-1 Contractors*. *A-1 Contractors* calls the Ninth Circuit's decision into question for two reasons. First, *A-1 Contractors* makes clear that the tribal court exhaustion doctrine cannot be applied, as it was in this case, in a rigid and mechanical fashion; instead, the Court described the exhaustion doctrine as a "prudential" rule requiring a flexible analysis of the practical consequences of abstention. 117 S.Ct. at 1413. *A-1 Contractors* also makes clear that the Ninth Circuit was wrong in assuming that exhaustion of tribal court remedies is mandatory unless the party seeking relief in the federal court can fit within the literal language of one of the three "exceptions" listed in footnote 21 of *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856 n.21 (1985).

A-1 Contractors itself recognizes that, in addition to the situations catalogued in footnote 21 of *National Farmers Union*, exhaustion of tribal court remedies is not required where the lack of tribal court jurisdiction is "plain" and requiring exhaustion of tribal court remedies would therefore "serve no purpose other than delay." 117 S.Ct. at 1416 n.14. The reasoning in *A-1 Contractors* strongly suggests that other "exceptions" may also be appropriate. At the very least, this case should be remanded to allow the Ninth Circuit to consider whether long-standing principles that allow a federal court to grant interim relief even if it must otherwise abstain in deference to a state proceeding should also be applied in the context of tribal court proceedings.[1]

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[1] In *Harrison v. NAACP*, 360 U.S. 167, 178-79 (1959), this Court held that a federal district court could issue an injunction to protect a plaintiff's federal rights even if it was required to abstain from deciding the ultimate merits pending the outcome of state court proceedings. So too in this case,

Second, this is precisely the kind of case contemplated by footnote 14 of *A-1 Contractors*, where it is "plain" that the Crow Tribe has no power to govern BN's conduct on its federally granted right-of-way and that the Crow Tribal Court therefore lacks subject matter jurisdiction over the *Red Wolf* case. Under these circumstances, BN was not required to exhaust its tribal court remedies before seeking a determination from the federal court that the tribal court judgment was void. Because the district court could have properly ruled on the merits of BN's complaint, it necessarily follows that it did not abuse its discretion in taking the much more limited step of enjoining enforcement of the tribal court judgment pending review.[2]

In opposing BN's Petition, respondents simply refuse to acknowledge the Court's reasoning in *A-1 Contractors*. Notwithstanding the Court's clear announcement of a new "exception" to the exhaustion doctrine in footnote 14 of *A-1 Contractors*, the *Red Wolf* plaintiffs contend that *A-1 Contractors* "did not change the mandatory nature of the exhaustion rule, nor did it change the exceptions." (Pl. Opp. at 13).

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even if the federal court was required to abstain from ruling on the federal question of tribal court jurisdiction until all tribal court remedies were exhausted, the federal court still had the power to grant interim injunctive relief to protect substantial federal interests in interstate commerce.

[2] The *Red Wolf* plaintiffs argue that the district court was required to abstain and therefore did not have subject matter jurisdiction over BN's complaint. (Pl. Opp. at 1 n.1). In *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 853 (1985), however, this Court held that the scope of tribal court jurisdiction is a federal question that gives rise to federal jurisdiction under 28 U.S.C. § 1331. And in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n.8 (1987), the Court emphasized that "the exhaustion rule enunciated in *National Farmers Union* did *not* deprive the federal courts of subject matter jurisdiction. Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite." (Emphasis added).

Similarly, Judge Arneson completely ignores footnote 14 of *A-1 Contractors* when he argues that under *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987), exhaustion is still required even if the jurisdictional facts in *Red Wolf* are indistinguishable from those in *A-1 Contractors*. (Arneson Opp. at 9). Respondents also offer numerous purported distinctions between the jurisdictional facts in *Red Wolf* and those in *A-1 Contractors*, in the apparent hope of taking this case out of the category of cases described in footnote 14 of *A-1 Contractors*, where exhaustion of tribal court remedies is not required. As demonstrated below, all of these arguments should be rejected.

1. Respondents argue that the Ninth Circuit properly adopted a mandatory rule of exhaustion under which a federal court would *never* be permitted to "interfere" in ongoing tribal court proceedings—no matter what rights or federal interests were at stake. (Arneson Opp. at 5). Thus, in respondents' view, unless and until the Crow Court of Appeals issues a final ruling on jurisdiction, the federal district court is powerless to take any action, no matter how limited it may be, to protect BN's interstate rail operations. To the extent the Ninth Circuit's decision can be read to adopt such an expansive exhaustion rule, it is clearly in conflict with the more flexible approach in *A-1 Contractors*.

Respondents try to justify a broad rule of exhaustion by citing what they describe as the "procedural nightmare" created by the district court's injunction in this case. In fact, however, the district court's order did not cause any confusion, nor was there any interruption in the post-trial or appeal process in the Crow courts. In any event, as this Court recognized in *A-1 Contractors*, it is all too often the exhaustion doctrine itself that creates a procedural nightmare, forcing non-Indian defendants to spend years litigating in an unfamiliar tribal court before they are able to seek federal court review of the federal question of whether the tribal court has jurisdiction over the dispute.

This is just such a case. Unlike the tribal court in *A-1 Contractors*, the Crow courts do not permit an interlocutory appeal from a decision upholding tribal court jurisdiction. As a result, BN has been unable, despite almost three years' effort, to obtain a final determination from the tribal courts on the issue of subject matter jurisdiction. Under respondents' view of the exhaustion doctrine, BN would be required not only to wait another year or more for its appeal to be decided by the Crow Court of Appeals, but also to choose between posting a $30 million bond in tribal court—with all the expense and risks that entails—and facing the possible destruction of its property on the reservation.[3] Respondents have not offered any sensible reason for imposing that kind of extraordinary burden on a non-Indian defendant in a case where it is clear, following *A-1 Contractors,* that the tribal court judgment lacks subject matter jurisdiction.

2. Moreover, it is not at all clear that the Ninth Circuit intended to adopt the expansive view of exhaustion respondents advocate. The court's opinion can be read as holding only that BN failed to exhaust its remedies on the issue of interim relief by failing to secure a "final ruling" from the Crow Court of Appeals "on the form and amount of security that would suffice to stay the judgment" pending appeal. *See* Pet. App. at 7a. If that is what the Ninth Circuit meant, any failure to exhaust has been cured because the Crow Court of Appeals has now issued a final order on that precise issue. On June 17, 1996, the court

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[3] The *Red Wolf* plaintiffs point to the fact that payment of the tribal court bond would be conditioned on exhaustion of BN's right to federal court review. (Pl. Opp. at 22). But, as demonstrated in BN's Petition, plaintiffs themselves have argued that federal court review does *not* include a review of any alleged deprivation of due process. Plaintiffs do not quarrel with BN's argument that without the federal court injunction BN would be forced to choose between protecting its property on the reservation from seizure and protecting its right to challenge the judgment outside the tribal courts on due process grounds.

issued its "Opinion and Order on Surety Bond" stating that after the tribal court enters the reduced judgment of $25 million, BN must post a $30 million bond in the tribal court in order to secure a stay of the judgment. (Arneson App. 12a). The entry of that Order is enough, in and of itself, to justify vacating and remanding the decision below to allow the Ninth Circuit to decide whether BN has exhausted its tribal court remedies and, if so, whether the entry of the preliminary injunction was an abuse of discretion. *See Lawrence v. Chater*, 116 S.Ct. 604, 606 (1996) (noting that the Court has "GVR'd in light of a wide range of developments, including ... changed factual circumstances").

3. Respondents also oppose BN's Petition on the ground that the jurisdictional facts in the *Red Wolf* case are distinguishable from those in *A-1 Contractors*. In fact, however, this case is on all fours with *A-1 Contractors*.

a. The first question that must be answered under the jurisdictional analysis in *A-1 Contractors* is whether the land where the accident occurred should be deemed the equivalent of the "non-Indian fee lands" in *Montana v. United States*, 450 U.S. 544 (1981). Respondents claim that the State highway where the accident occurred in *A-1 Contractors* met this requirement because it was "undeniably owned by the state."[4] They argue that *Red Wolf* is distinguishable because the Crow Tribe retains ownership of the land beneath the BN right-of-way. But respondents are simply wrong about the facts in *A-1 Contractors*. Just like the Crow Tribe, the Three Affiliated Tribes in *A-1 Contractors* continued to own the land underneath the highway. *See* 117 S.Ct. at 1413 ("the land underlying the scene of the accident [was] held in trust for the [tribes]").

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[4] *See* Pl. Opp. at 13; Arneson Opp. at 10 (arguing that in *A-1 Contractors* the tribes' title to the underlying land had been "extinguished" by the grant of the right-of-way).

Indeed, that ownership interest was in many ways the centerpiece of the tribal court plaintiff's case in *A-1 Contractors*: she argued, just as respondents do here, that "because the Tribe retains its beneficial ownership of the land, the [state's] easement has no bearing either on federal protection or jurisdiction." Petitioners' Reply in *A-1 Contractors* at 3.

The Court rejected the argument that ownership of the land was a controlling or even a relevant factor in the analysis, holding that the critical issue was whether the tribe had given up the right to exclude nonmembers from the right-of-way. The Court concluded that by consenting to a permanent easement without retaining any "gate-keeping right," the Tribes in *A-1 Contractors* had given up a "landowner's right to occupy and exclude" others from the right-of-way; under those circumstances, the right-of-way was "align[ed]" with "land alienated to non-Indians" and therefore governed by the presumption against tribal jurisdiction over nonmembers established in *Montana*. 117 S.Ct. at 1414. The same is clearly true here, where the Crow Tribe, by consenting to the railroad right-of-way, gave up its right to exclude others from using that particular strip of land.

Respondents also try to avoid the conclusion that the *Montana* test applies by arguing that plaintiffs' decedents may have been traveling on a tribal road as they crossed the railroad right-of-way. (Pl. Opp. at 13). Nothing in *A-1 Contractors*, however, suggests that the Court intended to vary the bright-line rule it adopted for federally-granted rights-of-way simply because an accident occurred at the intersection of the right-of-way with a tribal road. Nor should it make any difference, as a logical matter. The right-of-way maintains its character as such even when it is crossed by a tribal road. In this case, BN was undoubtedly operating on the right-of-way when the accident

occurred: so long as the train was on the tracks, it was, by definition, located on the federally-granted right-of-way.[5]

Respondents also contend that this case falls outside the *Montana* analysis because the plaintiffs' decedents were members of the Crow Tribe, while the plaintiff in *A-1 Contractors* was only a relative of tribal members. But the analysis in *A-1 Contractors* makes clear that the *plaintiff's* relationship to the tribe is irrelevant; what is controlling is the character of the land where the accident occurred and the fact that the *defendant* is not a member of the tribe. *See* 117 S.Ct. at 1407, 1408 ("tribal courts may not entertain claims *against nonmembers* arising out of accidents on state highways, absent a statute or treaty authorizing the tribal to govern the conduct of *nonmembers* on the highway in question") (emphasis added).

b. The second step in the jurisdictional analysis adopted in *A-1 Contractors* is to determine whether there is an explicit Congressional grant of jurisdiction to the tribe that would contravene the ordinary presumption against tribal court jurisdiction over the activities of non-Indians on land like the railroad right-of-way. 117 S.Ct. at 1413. As demonstrated in BN's Petition, there is no treaty or statutory provision granting the Crow Tribe the right to adjudicate claims arising out of crossing accidents. Respondents try to wring a grant of authority out of a provision in the 1889 Act establishing the right-of-

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[5] Like the petitioners in *A-1 Contractors*, respondents here also rely on the tribe's purported power to tax activities on the right-of-way, citing *Burlington Northern RR Co. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992). *See* Pl. Opp. at 13; Petitioners' Opening Brief in *A-1 Contractors* at 21-22. The *Blackfeet* decision, however, was based on a very different kind of analysis than the Court adopted in *A-1 Contractors*. Thus, even if that decision has some continuing viability in the tax context, it is entirely irrelevant in deciding whether the tribal court has jurisdiction over accidents on the railroad right-of-way.

way that required the railroad to be operated with "due regard for the rights of the Indians." Pet. App. 44a. But respondents fail to point out that the "due regard" provision is followed immediately by the statement that the railroad was to be constructed and operated "in accordance with such rules and regulations as the Secretary of the Interior may make to carry out this provision." *Id.* The only conclusion that can be drawn from this language is that the *federal government* was responsible for regulating the railroad's conduct and enforcing whatever obligations it owed to the Tribe; there is absolutely no indication in the Act that Congress intended the Tribe itself to regulate the operation of an interstate railroad or to adjudicate claims arising out of crossing accidents.

c. In a personal injury action, the jurisdictional analysis adopted in *A-1 Contractors* is complete once the court determines that (i) the nonmember defendant was traversing the reservation on a federally granted right-of-way and (ii) "it is plain that no federal grant provides for tribal governance of nonmembers' conduct" on that right-of-way. 117 S.Ct. at 1416 n.14. Although *Montana* recognizes two possible exceptions to the presumption against tribal jurisdiction over such conduct, the Court's opinion in *A-1* Contractors makes clear that those exceptions will rarely, if ever, apply in a personal injury action. *See* 117 S.Ct. at 1416 n.14 (stating that when it is "plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct").

In any event, under the analysis in *A-1 Contractors,* it is clear that the *Montana* exceptions do not apply here. Respondents argue that the first exception (for claims arising out of consensual relationships) applies because BN was required to obtain the tribe's consent for the right-of-way. But, as *A-1 Contractors* itself demonstrates, a consensual relationship between the tribe and the defendant does not create tribal court

jurisdiction; instead, there must be a consensual relationship between the plaintiff and defendant—a factor that is almost always missing in a personal injury case. *See id.* at 1415.

Respondents also rely on a "health and welfare" rationale, claiming that the railroad has been responsible for the deaths of 25 members of the Tribe.[6] *A-1 Contractors*, however, makes clear that safety concerns cannot support the exercise of tribal jurisdiction over the conduct of nonmembers on a federally-granted right-of-way. Thus, the Court recognized that careless driving would "surely jeopardize the safety of tribal members," yet found no basis for tribal court jurisdiction as a result of that threat. 117 S.Ct. at 1415. Instead, the Court held that the second *Montana* exception would support tribal court jurisdiction only where it was necessary "to protect tribal self-government or to control internal relationships" or to "preserve 'the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* at 1416. Those interests are not implicated here any more than they were in *A-1 Contractors*.

Respondents' attempt to delve into the details of this case supports, rather than avoids, the need for a vacating and remanding the judgment below. Neither the district court nor the Ninth Circuit had an opportunity to consider the impact of this Court's decision in *A-1 Contractors*. While BN believes that the absence of tribal court jurisdiction is clear under *A-1 Contractors*, analysis of the various factual distinctions asserted by respondents is properly handled, in the first instance, in those federal courts.

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[6] Plaintiffs' claims of 25 other fatalities are exaggerated; moreover, there is not a shred of evidence to suggest that BN was responsible for the deaths that did occur. In any event, for the reasons outlined below, plaintiffs cannot use their claims of negligence to bootstrap themselves into a finding of tribal court jurisdiction.

CONCLUSION

Respondents argue that the Crow courts should decide, in the first instance, whether and to what extent *A-1 Contractors* is controlling.[7] Under footnote 14 of *A-1 Contractors*, however, it is the *federal* courts that must decide whether the lack of subject matter jurisdiction is so plain that any exhaustion requirement must give way. Moreover, for all the reasons outlined above, this Court's flexible approach to the issue of tribal court exhaustion in *A-1 Contractors* is fundamentally at odds with the Ninth Circuit's rigidly mechanical application of that doctrine. Because neither the district court nor the Ninth Circuit had the benefit of this Court's decision in *A-1 Contractors*, the Court should grant BN's petition or grant, vacate and remand to the Ninth Circuit to allow reconsideration in light of the intervening change in circumstances.

Respectfully submitted.

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[7] A recent scheduling order issued by the Crow Court of Appeals suggests that it has already prejudged the outcome of the jurisdictional debate. While directing the parties to address the applicability of *A-1 Contractors*, the Court stated in a footnote that "[b]ased on our initial reading, Tribal Court jurisdiction is not controlled in this case by the Court's recent decision in *Strate v. A-1 Contractors*." (Arneson App. 2a).